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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

March 3, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

34 pp

QUESTION PRESENTED

Whether the court of appeals erred in upholding the certification, pursuant to Fed.R.Civ. P.23(b)(1)(B), of a non-opt-out class settlement of millions of exposure-only asbestos victims with no current injury, because:

(1) the requirements of Rule 23(a) may not be met solely by reference to the terms of a settlement (a question also presented in *Amchem Products, Inc. v. Windsor*, No. 96-270 (argued Feb. 18, 1997));

(2) even if a settlement may sometimes be used to meet the requirements of Rule 23(a), certification was error here because of dissimilarities among class members, inherent structural conflicts within the class, the impossibility of notice to future claimants, and inadequate representation by class counsel manifested in part by their negotiation of different settlements for their individual clients outside the class from the same resources to be used to finance the class settlement (a question similar to one presented in *Amchem*);

(3) a federal court has no Art. III power to adjudicate a "case" which is brought by plaintiffs who do not in good faith plead claims they intend to litigate, and which is brought as a friendly joint venture with the defendants solely to provide a jurisdictional hook for a federal court to impose upon a nationwide class a tort reform proposal displacing state law (a question also presented in *Amchem*);

(4) due process requires that absent class members (including residents of the State where the action is brought) be given the chance to opt out of any class action purporting to bind them with respect to *in personam* claims for money damages (a question also presented in *Adams v. Robertson*, No. 95-1873 (dismissed as improvidently granted, March 3, 1997));

(5) due process prohibits a court from exercising personal jurisdiction over class members asserting claims for damages who lack minimum contacts with the forum State, unless they have an opportunity to opt out (a question also presented in *Adams*);

(6) under the Rules Enabling Act, Rules of Decision Act, and principles of federalism, Fed.R.Civ.P. 23(b)(1)(B) may not, where the "limited fund" is contrived by a settlement between the parties, be used to deprive unidentifiable and unknowing "future" claimants of their right to pursue their own *in personam* damage claims when they arise.

PARTIES TO THE PROCEEDING

The petitioners in this case are Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers. The defendant is Fibreboard Corporation. The plaintiff class representatives are Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison, James Drake, and Juanita Drake. The insurers who intervened below are Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company. The other parties are Roland Dearborn; Judith Dearborn; Kerwin Butcher, Director, Office of Workers' Compensation Programs, U.S. Department of Labor; James Flanagan; David Middleton; Owens-Illinois, Inc.; Bethlehem Steel Corporation; Kenneth Smith; Plant Insulation Company; and Safety National Casualty Corporation.

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JURISDICTION

The judgment of the court of appeals (App. 64a) was entered on July 26, 1996, and a timely petition for rehearing was denied on December 3, 1996. App. 523a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

Pertinent portions of Article III of the U.S. Constitution, the Due Process Clause of the 5th Amendment, the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed.R.Civ.P. 23 are set forth in Appendix M at pages 525a-527a.

STATEMENT OF THE CASE

Like *Amchem Products, Inc. v. Windsor*, No. 96-270 (argued February 18, 1997), this case involves a nationwide class action settlement that resolves the unaccrued personal injury claims of millions of presently uninjured people who have been exposed to asbestos. Although this case raises several issues that are not presented in *Amchem*, the two cases present identical questions as to the limits of an Article III court's subject-matter jurisdiction to approve a privately negotiated tort reform proposal, and as to whether the criteria of Rule 23 are satisfied, for what would otherwise be an uncertifiable class, simply because the case has already been settled.

Moreover, this case also presents the question whether due process requires that all class members — including (but not limited

to) non-residents of the state where the action is brought — be permitted to exclude themselves from any class action purporting to resolve their *in personam* claims for damages. The Court issued a writ of certiorari to consider this question in *Adams v. Robertson*, No. 95-1873 (writ dismissed as improvidently granted, March 3, 1997), but was unable to reach the merits of the issue in light of a procedural default. The Court went out of its way in *Adams* to note its "continuing interest in [this] issue," slip op. at 8 n. 6, and — unlike *Adams* — this case presents the question squarely.

In addition to its overlap with *Amchem* and *Adams*, this case is independently worthy of review because it is the first-ever certification of a mandatory, future-claimant, settlement-only class action. The aggregate effect of the settlement's multiple restrictions on asbestos victims' due process rights, on top of the Fifth Circuit's refusal to recognize the proper limitations of federal judicial power, amplifies the importance of this case. Indeed, recognizing both that the case is extraordinarily important and that the panel's decision was questionable, a majority of the Fifth Circuit judges that considered the suggestion for rehearing en banc voted to rehear the case.

The Fifth Circuit denied rehearing en banc only by a quirk of its local rules. Five of the seventeen active Fifth Circuit judges were recused, and another declined to participate in the en banc poll. App. 519a-522a. Although the participating judges favored rehearing by a majority of six to five, Fifth Circuit Rule 35.6 provides that active judges who are disqualified or recused nonetheless are counted for purposes of determining the majority required to grant en banc rehearing. *See* 28 U.S.C. § 46(c). Had the same vote occurred in, for example, the Second, Seventh, or Tenth Circuits, rehearing en banc would have been granted. *See* Second Circuit Rule 35; Seventh Circuit IOP 5(d)(1); Tenth Circuit Rule 35.5.

In view of the importance of the issues raised and their overlap with pending cases, this Court should grant plenary review or, at the very least, hold this petition in abeyance pending the decision in *Amchem*.

1. Background and Settlement Negotiations. Fibreboard's corporate predecessors manufactured and distributed asbestos-containing products from the 1920s until 1971. By 1988, Fibreboard had exhausted substantially all of its insurance resources available to

defend and indemnify asbestos lawsuits, with the exception of contested coverage arising out of policies issued by Continental Casualty Co. ("CNA") and Pacific Indemnity ("Pacific") for the years 1957 through 1959. While both insurers disputed any coverage for Fibreboard's current and future asbestos liabilities, their potential exposure was unlimited, as none of the contested policies had an aggregate limit on coverage. The coverage dispute has been the subject of litigation between Fibreboard and the Insurers in the California state courts since 1985.[1]

This proceeding began as an insurance coverage dispute among Fibreboard, Pacific, and CNA. No "plaintiff" or "claimant" who had been injured by asbestos products came forward to file a class action complaint with the district court. Rather, the case began when Fibreboard, possessing (a) $225 million in net worth which it wished to protect and (b) the possibility of unlimited insurance coverage in the future, established a "corporate goal" of "manag[ing] and resolv[ing] its asbestos liabilities within its available insurance resources." App. 552a-553a. In 1991, Fibreboard sought out several nationally prominent asbestos plaintiffs' attorneys – Harry Wartnick, Steven Kazan, Joseph Rice, and Ron Motley[2] – and invited them to negotiate a "global" solution to Fibreboard's total potential future asbestos liabilities. Those plaintiffs' attorneys agreed to commence negotiations, which originally contemplated an assignment of Fibreboard's disputed insurance coverage to present and future

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[1] In 1996 the California courts finally resolved the bulk of the contested coverage issues in favor of Fibreboard. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). Since that decision, the Fifth Circuit has mooted the coverage litigation altogether by affirming the district court's approval of the "Trilateral Settlement Agreement" in the case of *Continental Casualty Co. v. Rudd*. App. 58a-64a. As described below, the Trilateral Agreement compromises Fibreboard's coverage dispute independently of the class settlement in this case.

[2] In May 1992, Joseph Cox, a partner at the Ness Motley firm, replaced Mr. Motley. This petition will refer to Messrs. Cox, Rice, Wartnick, and Kazan as "class counsel."

asbestos claimants, along with some additional consideration from Fibreboard to settle certain claims for which no insurance existed.

In March 1993, CNA began participating in global negotiations with class counsel and Fibreboard to resolve both its coverage dispute and Fibreboard's present and future asbestos liabilities. On August 9, 1993, Pacific came to the negotiating table. By Order of August 9, 1993, the Hon. Robert M. Parker, then Chief Judge of the Eastern District of Texas,[3] purported "to authorize the following attorneys [Messrs. Rice, Cox, Kazan, and Wartnick] to negotiate with Defendant the prospect of a Rule 23(b)(1)(B) settlement class composed of future claims against Fibreboard." App. 11a. Thus, before a lawsuit had even been filed and assigned to Judge Parker's court, Judge Parker purported to "appoint" counsel to negotiate a settlement with the defendant, ostensibly on behalf of unnamed (and unknown) plaintiffs to be named later. Judge Parker participated intensively in the settlement negotiations. App. 11a-13a. The critical settlement discussions that produced the final agreement were held at Judge Parker's home, ostensibly because the courthouse was closed for the day and because the parties wished to reach agreement before an oral argument in the California Court of Appeals in the insurance coverage case on August 27, 1993. *Id.*

On August 27, 1993, the settling parties announced their proposed Global Settlement of future asbestos claims. That same day, the insurers and Fibreboard independently agreed to resolve their insurance coverage dispute with respect to *all* claims, both present and future, whether or not the Global Settlement of future asbestos claims received court approval. This independent Trilateral Agreement, formalized on October 12, 1993, provides that, if the Global Settlement is not ultimately approved, the insurers will pay Fibreboard $2 billion, which Fibreboard can then use — in addition to its own assets — to resolve "future" and unsettled "present" claims as such suits are filed in the years to come. Unlike the Global Settlement, the Trilateral Agreement in no way limits the legal rights of asbestos victims with respect to their claims against Fibreboard. As a result of the Trilateral Agreement, there exists no threat that

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[3] After the class action complaint was filed, Judge Parker became a judge of the Fifth Circuit; he continued to sit as district judge in this case by designation.

Fibreboard might have no insurance coverage with which to pay future asbestos claims.[4]

On September 9, 1993, the settling parties filed the complaint in *Ahearn v. Fibreboard Corp.*, No. 6:93cv526 (E.D. Tex. 1993), the class action lawsuit they had "settled" two weeks earlier. App. 528a. The complaint alleged claims on behalf of all those who have been exposed to asbestos for which Fibreboard may be liable, but who had not filed, or had dismissed without prejudice, an asbestos-related lawsuit against Fibreboard prior to August 27, 1993, and all past, present, and future spouses, parents, children, and other relatives of such individuals. *Id.* at 4. While the complaint sought damages for the proposed class only against Fibreboard, CNA and Pacific immediately intervened as defendants. App. 14a; 543a.

At the same time they filed their complaint, class counsel and the insurers jointly moved for certification of a mandatory, nationwide class under Fed.R.Civ.P. 23(b)(1)(B) — whether or not the class members currently had an actionable asbestos-related condition. In other words, potential asbestos plaintiffs were included in the proposed class even if they had not yet sustained physical injury, had no accrued claims, and were protected by state laws from the running of statutes of limitations on any claims they might develop in the future, while currently injured asbestos plaintiffs who had already sued were simply defined as being outside of the class and were thereby automatically opted out of this non-opt-out class.

For those few putative class members who had already developed an asbestos-related disease, the complaint sought damages for personal injuries. For all other class members — the overwhelming majority — who had been exposed to asbestos but had not yet developed any discernible physical injury as a result, the

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[4] The insurers filed suit against a defendant class of "future" asbestos claimants (*Continental Casualty Co. v. Rudd*), seeking a declaration that the Trilateral Agreement was fair and reasonable with respect to the defendant class members, who are the potential third-party beneficiaries of the policies. The district court approved the Trilateral Agreement; petitioners neither objected to that agreement nor appealed from the district court's judgment. Although the Fifth Circuit consolidated *Rudd* with this case, following issuance of the panel's decision in the two cases *Rudd* was severed. No party sought rehearing of the *Rudd* decision and the *Rudd* judgment is now final.

complaint purported to seek damages for their increased risk of contracting asbestos-related diseases in the future, for emotional distress arising from the fear of contracting future diseases, and for medical monitoring to detect those diseases. App. 537a.

On the same day that the complaint and joint motion for class certification were filed, Judge Parker provisionally certified the class "for settlement purposes only" under the so-called "limited fund" provision of Fed.R.Civ.P. 23(b)(1)(B). App. 515a. This "provisional" certification occurred at an irregular meeting held in New Orleans, outside Judge Parker's judicial district in Texas, on September 9, 1993. There had been no notice to any absent member of the class of this impromptu proceeding. There was no opportunity for objectors to participate. At that September 9 "hearing" in New Orleans, Judge Parker purported to designate counsel for one of the defendants as "a deputy district clerk for the Eastern District of Texas" and entrusted him with the original copies of Judge Parker's orders for filing with the Clerk of the Eastern District Court back in Texas. App. 598a-600a. Also on September 9, 1993, the district court appointed as class counsel the four asbestos plaintiffs' attorneys who had negotiated the settlement announced on August 27. App. 14a. Three months later, on December 23, 1993, the settling parties filed the written settlement document formalizing the provisions of the agreement they had reached in August. App. 14a-15a.

2. The terms of the global class settlement. Although the class complaint of course alleged no unaccrued claims for future personal injuries, the central feature of the Global Settlement is that all class members *release* those claims. The settlement provides that CNA and Pacific will contribute $1.525 billion to a Trust to be established on behalf of all class members, and Fibreboard is to contribute only an additional $10 million (out of its net worth of at least $225 million). In return, Fibreboard is forever released from any lawsuit that class members might bring in the future, and the insurers are released from any responsibility for defending against or indemnifying such claims. App. 16a.

This release of unripe future claims provides the means for Fibreboard to achieve its "corporate goal" (App. 553a) of resolving its asbestos liabilities within the limits of its available insurance resources. This surrender of future claimants' rights also allows the

insurers to achieve total peace with respect to all potential claims for which they might be responsible. Because the class was certified as a mandatory class under Rule 23(b)(1)(B), class members were given no opportunity to exclude themselves from this compulsory release of their as-yet unaccrued claims. The Global Settlement extinguishes class members' claims even if they received no notice of the settlement and hence were unable to object to it in a timely manner, even if they were unaware of their own exposure to asbestos or of the past exposure of whoever was to become their parent or spouse, and even though only a tiny percentage of the class members have yet suffered any injury from their exposure.

In return for this forced release of all future, unaccrued claims, class members are allowed the opportunity, if and when they develop an asbestos-related disease, to present a claim against the Trust established under the Global Settlement. Once a class member submits a complete claim and furnishes all necessary information to support that claim, the Trust will make an offer of settlement after completing an initial evaluation of the claim. App. 564a. If the class member accepts such an offer, she will be paid in three annual installments – 40 percent in the first fiscal year after the offer has been accepted, and 30 percent in each of the following two years. App. 581a-582a. If the class member rejects the offer, she may then proceed to mediation, non-binding arbitration, and finally a mandatory settlement conference.

Only after enduring all of these delays may a class member finally file a lawsuit against the Trust, but the Global Settlement imposes significant limitations on that lawsuit. Class members cannot recover punitive damages, prejudgment interest, or post-judgment interest. App. 560a. They are limited to a maximum of $500,000 in compensatory damages, no matter how much damage is assessed by the jury. App. 583a. Even in jurisdictions that provide for joint and several liability, they are limited to the portion of liability assigned to the Trust, which stands in the shoes of Fibreboard for purposes of trial. App. 560a. If the class member ultimately prevails, the Trust is allowed to pay the class member's judgment in installments over a period of five to ten years. App. 312a; 582a.

3. District Court Proceedings. The five petitioners are all members of the plaintiff class who intervened in the district court for

purposes of objecting to the proposed Global Settlement. The district court held a hearing regarding the fairness of the proposed class settlement but did not conduct a hearing on class certification.

On July 27, 1995, the district court certified the class pursuant to Rule 23(b)(1)(B) and granted final approval of the settlement. The court overruled all objections to the Global Settlement, and issued a Memorandum Opinion, Findings of Fact, and Conclusions of Law. In addition to approving the settlement, the district court awarded the plaintiff class counsel chosen by Fibreboard a total of $43.7 million in fees. App. 512a-514a.

4. The Court of Appeals' Decision. A divided panel of the Fifth Circuit affirmed, over the strenuous and comprehensive dissent of Circuit Judge Jerry Smith. The majority expressly declined to follow the Third Circuit's decision in *Georgine v. Amchem Products* concerning the role of a settlement in a district court's class certification decision. App. 21a-22a. Instead, the panel held that the settlement was sufficient to satisfy the commonality and typicality requirements of Rule 23(a) and asserted that "significant differences" among individual class members "do not affect the settlement in the least." App. 23a-24a. Moreover, the majority also concluded that Rule 23, due process and Article III did not bar the release of class members' future claims, because "the settlement . . . does not purport to make any determination of the validity or amount of individual personal injury claims against Fibreboard." App. 50a-51a.

Petitioners argued that class counsel should not have represented individual asbestos claimants with present injuries and claims at the same time they were negotiating on behalf of a class of future claimants, because the interests of those two groups conflict over how any settlement should allocate and limit recovery. Ignoring Fibreboard's claim — and the court's own determination — that Fibreboard's assets constitute a so-called "limited fund" within the meaning of Rule 23(b)(1)(B), the Fifth Circuit majority concluded that, although

> Counsel certainly knew in a general way that there was a sum beyond which Continental would not pay[,] ... because they did not know that limit, they did not know that this limit would be less than an amount they were willing to accept in settlement for both classes of claimants.

App.31a-32a. Even the settling parties' expert admitted, however, that the insurers' ceiling price might not be high enough to satisfy both present and future claimants fairly. 5th Cir. Joint Appendix, Vol. VII, at 2383-84.

The Fifth Circuit also upheld the district court's certification of a mandatory class under Rule 23(b)(1)(B) with respect to the class members' *in personam* claims for damages. The court of appeals held Rule 23(b)(1)(B) applicable because the theoretical possibility of future insolvency created a "'risk' that separate adjudications 'as a practical matter' would 'substantially impair or impede' the interests of the class." App. 43a. The court also rejected petitioners' contention that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), requires that all class members be afforded an opportunity to exclude themselves from this class purporting to bind them with respect to their claims for money damages. The Fifth Circuit majority held that *Shutts* did not apply because the theoretical risk of Fibreboard's future insolvency transformed the action from one seeking classwide disposition of individual monetary claims for *in personam* tort damages into a "unitary," "*in rem*" claim for equitable allocation of a limited fund. App. 49a-50a.[5] Although petitioners argued that the Rules Enabling Act and related principles of federalism prohibited the district court's *pro rata* adjustment of the class members' substantive state law rights through certification of a mandatory class resolving claims for *in personam* damages, the court failed even to acknowledge that issue.

Finally, the court of appeals brushed aside petitioners' arguments that the district court lacked subject-matter jurisdiction to approve this settlement of unaccrued, future damages claims. The majority declined to rebut Judge Smith's extended analysis that the "exposure-only" class members lacked standing. App. 119a-146a. However, the

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[5] The court also rejected petitioners' narrower, alternative contention that due process at least requires that class members who lack minimum contacts with the forum state of Texas be given an opportunity to opt out, so that their failure to do so might be construed as consent to the court's exercise of personal jurisdiction. App. 46a-48a. *See Shutts*, 472 U.S. at 812. Petitioners Allgood, Evers and Taylor are Alabama residents who lack even minimum contacts with Texas.

panel majority expressly rejected petitioners' contention that the action was a "feigned" case that failed to meet Article III's "case or controversy" requirement. App. 52a-54a.

In a lengthy dissenting opinion, Judge Smith chastised the majority for "refus[ing] to reverse — or veto — certification of this no-opt-out, mass-tort, settlement-only, futures-only class action." App 148a. Judge Smith observed that "[o]ur sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here." App. 73a. His critique emphasized both the majority's failure to protect the due process rights of absent class members and its failure to recognize that the federal judicial power is limited to the adjudication of adversarial lawsuits. App. 68a. Judge Smith explained that:

> The district court legislated a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit. Of course there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they had already settled it.

App. 70a. The bulk of the settlement, moreover, "is purely legislative: Class members' causes of actions are repealed in favor of the equivalent of a workers' compensation regime." App. 71a. Judge Smith commented that "the victims" — the absent class members — "were the only entity absent from the bargaining table. Perhaps for that reason, they also were the only losers." App. 66a. They were compelled to trade away Fibreboard's liability for nothing to which they did not already have a right. App. 65a. Meanwhile, "Fibreboard's stock soared" after the settlement was announced. App. 77a.

Judge Smith detailed the due process, federalism, Rule 23, Article III, and other fundamental problems with the district court's decision. He also raised grave questions about Judge Parker's leading role in creating this class action: "[i]n the end, [Judge Parker] appears to have become too close to both the overall problem and the instant settlement to act in a judicial capacity in this case." App. 66a. And, emphasizing that the settlement here presents a "new animal," Smith decried the majority's assertion that the "unique facts" of the case justify evisceration of class members' due process rights.

Rather, those "novel facts may actually call for *enhanced*, not lessened, protections for vulnerable asbestos victims." App. 80a-81a (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS ISSUES RAISED IN *AMCHEM PRODUCTS V. WINDSOR.*

Many of the legal issues raised in this case have already been presented to this Court in *Amchem Products, Inc. v. Windsor*, No. 96-270 (argued February 18, 1997). Like that case, this action involves the extraordinary application of Fed.R.Civ.P. 23 to a settlement class action brought to resolve the unaccrued future personal injury claims of millions of people who have been exposed to asbestos.

A. The Court Below, Like The District Court In *Amchem*, Erred By Predicating Class Certification Entirely On The Existence Of A Settlement.

By its terms, Rule 23 permits judicial resolution of the rights of persons not before the court only when the prerequisites of commonality, typicality, and adequacy of representation have been met, *in addition to* the other safeguards of Rule 23, such as the 23(e) requirement of judicial approval of any settlement. But in determining whether this class action meets both the commonality and typicality criteria, the Fifth Circuit ignored class members' actual legal claims and instead wholly relied on the settlement.

Here, as in *Amchem*, the lower courts' ruling that the class met the Rule 23(a) requirements of commonality and typicality was premised on the class members' general common "interest" in maximizing compensation from the proposed settlement. App. 22a-24a & n. 8; App. 191a-192a; *Amchem* Cert.Pet.App. 226a-227a. Indeed, in reaching this holding on Rule 23(a), the district court below relied expressly upon the district court decision in *Amchem*. App. 191a (citing *Georgine v. Amchem Products*). And the Fifth Circuit panel acknowledged that all of the common "issues" it

identified as satisfying Rule 23(a)(2) "are derived from the settlement rather than from the *Ahearn* complaint." App. 23a. Likewise, the court concluded that 23(a)(3)(typicality) was met because the class representatives have settlement-derived "interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation" that are typical of all class members. App. 23a.

Thus here, as in *Amchem*, the "vice" is that the "settlement is being used as a sufficient basis in and of itself to answer ... these various preceding conditions for class certification." Tr. Oral Arg. in No. 96-270 (Feb. 19, 1997) at 17 (Souter, J.). A class action that concededly cannot be certified without settlement is, by definition, a class action that cannot be certified without the defendant's consent. To read Rule 23 as permitting class actions of this sort is to do much more than eliminate the leverage plaintiffs normally have in settlement negotiations — the leverage that comes from being able to threaten to take the defendant to court if it refuses to settle. Reading Rule 23 to permit class actions in which defendant has unilateral power to prevent class certification — i.e., to prevent the case from being adjudicated — entails giving the defendant enormous power over absent class members to whom the defendant owes no fiduciary duty whatsoever. This would create what amounts to an agency relationship between the defendant and the absent class plaintiffs that not only (1) trenches on the law of whatever state supplies the causes of action that are thereby put into the hands of the adversary, thus contravening the Rules Enabling Act, 28 U.S.C. § 2072(b), but also (2) violates the due process principles recognized in *Hansberry v. Lee*, 311 U.S. 32, 41-45 (1940). *See Richards v. Jefferson County*, 116 S.Ct. 1761, 1764, 1767-68 (1996).

Under the Fifth Circuit's interpretation of Rule 23, literally anyone can be a common, typical, and adequate representative of any random group of people, so long as that person negotiates a class settlement on behalf of that group. Once the negotiation has been completed, the class certification inquiry is satisfied by the settlement itself: even though the group may not have held legal "claims or defenses," Rule 23(a)(3) — or anything else — in common *before* the negotiation, once a settlement is achieved, they all have common interests in benefitting from the settlement. Assuming that the

settlement then survives the court's fairness inquiry under Rule 23(e), the Rule has been satisfied and the settlement is binding.

This cannot be the law. Under the text and structure of Rule 23, each of the provisions of subdivisions (a) and (b) is an independent requirement that must be satisfied, quite apart from the additional barrier created by Rule 23(e), which prohibits settlement without court approval. Rule 23's requirements are cumulative, not alternative. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). The requirements of Rule 23(a) are necessary to ensure that the virtual representation of an absent class remains consistent with due process. A district court's after-the-fact "fairness" review was never meant to substitute for the multiple structural protections built into Rule 23. The most fundamental principles underlying class actions limit the powers of the class representatives to the claims they possess in common with other members of the class. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S.Ct. 873, 888-90 (1996)(Ginsburg, J., joined by Stevens and Souter, JJ., concurring). This restriction is rooted in the basic rationale underlying the adequacy of representation requirement: "the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 1.13 at 1-36 (3d ed. 1992).

The decision below thus flouts the very requirements of Rule 23(a) that this Court has rigorously enforced as the *sine qua non* of due process in cases of virtual representation. *See, e.g., General Tel.Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982) (Mexican-American employee who was denied a workplace *promotion* was not typical of a class of Mexican-American job *applicants*); *East Texas Motor Freight System, inc. v. Rodriguez*, 431 U.S. 395, 403-05 (1977) (concluding, on basis of survey of record, that named plaintiffs could not meet adequacy of representation requirement of Rule 23(a)); *Hansberry v. Lee*, 311 U.S. 32, 40, 44 (1940) (upholding collateral challenge on grounds of inadequate representation and explaining that stipulation of parties in prior litigation that 95 percent of owners had signed covenant — which was contrary to fact — could not be binding on court); *see also Richards v. Jefferson County*, 116 S.Ct. 1761, 1766-68 (1996)

(holding that prior litigation to challenge constitutionality of county's occupation tax could not bind different taxpayers who received no notice or adequate representation in prior suit, and rejecting Alabama Supreme Court's purported finding that representation was adequate).

The abrogation of Rule 23(a)'s protections in the settlement context is even more troubling where, as here, (1) the case was settled before there were any representative plaintiffs, (2) the settlement releases *future* claims for which no representative could *ever* be considered typical, and (3) class membership is mandatory. Indeed, this class could not have been certified even under the Fifth Circuit's erroneous theory that a settlement can be used to substitute for the Rule 23(a) class requirements.

First, the typicality requirement could not possibly be met in this nationwide class of everyone who might someday be injured by exposure to Fibreboard's asbestos. The class is "a hodgepodge of factually as well as legally different plaintiffs." *Amchem* Cert.Pet.App. 53a. The settlement only makes this fatal lack of typicality more obvious:

> The settlement's prohibition on punitive damages affects plaintiffs from different states differently; its caps on individual recovery discriminate against the most seriously injured class members; and its spendthrift provisions alter the distribution of funds between extant and latent claimants.

App. 101a-102a (Smith, J., dissenting).

Second, as just demonstrated, the settlement does nothing to cure the lack of adequate representation that inevitably flows from mass resolution of such divergent and antagonistic interests. As in *Amchem*, the class in this case was plagued by an inherent, structural intra-class conflict between presently injured and exposure-only class members. App. 110a-113a (Smith J., dissenting); *Amchem* Cert.Pet.App. 49a ("the most salient conflict in this class action is between the presently injured and futures plaintiffs"). Furthermore, as Judge Smith explained at length, class counsel and their current inventory of clients had huge financial interests in conflict with the members of this class action. App. 107a.

Third, these fatal defects in virtual representation of the absent class were compounded here, as in *Amchem*, by the inherent due process problem in providing any type of meaningful notice to unidentified, unknowing, future tort claimants. Many class members are unaware of their own exposure to asbestos, and others are unaware of the exposure of a spouse or family member. In any event, no class member can meaningfully assess *today* whether the settlement will be in his best interests at such future time as an asbestos-related injury may occur. In the context of a mandatory settlement class, due process requires that class members have an opportunity to make an informed decision whether to oppose or acquiesce in the class settlement.[6] Here, where class members' claims have not yet accrued, such an informed decision is not possible.

B. Like *Amchem*, This Class Action Is Not A Justiciable Controversy Under Article III.

This case, like *Amchem*, raises fundamental questions regarding the propriety of an Article III court's assertion of jurisdiction over a "class action" that the parties admit they never intended to litigate, solely to stamp its approval upon a nationwide settlement permanently releasing unripe, future claims. The Fifth Circuit's decision endorses the use of federal judicial power to enact a prospective change in the substantive state law rights of unconsenting, unknowing, potential future tort claimants. As Judge Smith explained in detail, "[t]his case shatters the constitutional limits placed on the authority of the federal courts by Article III"(App. 120a):

> When we depart from that role [of resolving cases and controversies] by considering generalized grievances or private dispute resolution mechanisms, we quickly find

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[6] Notice was vital (and compelled by Rule 23(c)(2)) in *Amchem* in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and exercise their rights under Rule 23(b)(3) to opt out of the class. Here, notice was equally vital (and compelled by Rule 23(e)) in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and decide whether to object to it.

ourselves acting more as legislative policymakers than as judges.

This Court has found "unfit for adjudication" any cause that "'is not in any real sense adversary,' that 'does not assume the honest and actual antagonistic assertion of rights,'" and which therefore violates "a safeguard essential to the integrity of the judicial process." *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (quoting *United States v. Johnson*, 319 U.S. 302, 305 (1943)). Here, even a cursory look beyond the pleadings reveals that this "lawsuit" is a charade. The class complaint, the document upon which the district court's jurisdiction must be premised, was no more than a contrivance to ripen prematurely claims that will exist, if at all, only at some unknown time in the future. Just as in *Amchem*, the filing of the complaint was choreographed by the settling parties solely as part of their joint effort to foist their negotiated tort reform proposal upon the class. Article III jurisdiction may not rest upon such a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905); *Cleveland v. Chamberlain*, 66 U.S. 419, 425-26 (1861).

The panel below admitted that "clearly [the plaintiff class] did not intend to litigate the complaint," but held that the district court could nonetheless assert jurisdiction to approve the settlement because of "the adversarial nature of the disputes which the settlement resolves."App.52a. But tough "negotiations" are commonplace both in private contractual dealings and in the legislative process, so they can hardly distinguish those processes from *adjudication* — the *sole* province of an Article III court. How much struggle took place *before* the pleadings were submitted to the district court — that is, before a lawsuit existed even in name — proves nothing about the existence of a justiciable controversy *in that court*.

Moreover, the disputes that fueled the class settlement negotiations — primarily, the amount of money Fibreboard's insurers would pay to resolve their coverage dispute — are *not* the disputes embodied in the sham allegations of the class complaint. The complaint alleges individual, *in personam* personal injury claims *against Fibreboard*, but the settlement negotiations focused on the

aggregate amount of potential liability the *insurers* could face, and the merits of their policy defenses.[7] The latter disputes were between Fibreboard and the insurers, and the interests of the class with respect to them were aligned with those of Fibreboard. The class did not and could not stand in Fibreboard's shoes to allege coverage claims against the insurers. In any event, alleging those coverage claims on Fibreboard's behalf would not have given the class representatives authority to release absentees' separate personal injury claims *against* Fibreboard. *See National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981)(Friendly, J.).[8]

In short, this "case" is a legislative joint venture, not an adversarial lawsuit. A federal court's only constitutionally permissible option when such circumstances appear is to dismiss the action for lack of subject-matter jurisdiction. *See United States v. Johnson*, 319 U.S. 302 (1943); *Moore v. Charlotte-Mecklenburg Bd.*

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[7] Here, as in *Amchem*, the class settlement does not itself redress the claims pleaded by the exposure-only class representatives in the complaint. App. 70a. Indeed, as Judge Smith explained in great detail (App. 119a-146a), there is serious question whether the exposure-only plaintiffs in this diversity suit can show "an invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), sufficient to confer standing, because many states' substantive law affords no cause of action to protect against mere exposure to a toxin. This Court has unanimously held that the question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *Int'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Therefore, "when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." App. 143a (Smith, J., dissenting). "Any claims not authorized by state law should have been explicitly excised" from the class complaint in this case because the district court lacked jurisdiction over them under Art. III. App. 145a.

[8] Given that the "exposure only" class members never intended to pursue the claims alleged, they have no "injury in fact" sufficient to support Article III standing. Here, as in *Amchem*, Article III's requirement of actual or imminent injury "has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time." *Lujan*, 504 U.S. at 564 n.2. *See* Cert.Pet.App. in *Amchem*, No. 96-270, at 60a-61a, 66a.

of Educ., 402 U.S. 47 (1971); *Muskrat v. United States*, 219 U.S. 346 (1911); *Chicago & G.T. Ry. v. Wellman*, 143 U.S. 339 (1892).

II. THIS CASE PRESENTS ISSUES RAISED IN *ADAMS V. ROBERTSON.*

This case also presents two due process issues that were before this Court, but which were not decided, in *Adams v. Robertson*, No. 95-1873 (certiorari dismissed as improvidently granted, March 3, 1997). The first issue is whether due process requires that all absent class members (including residents of the state where the action is brought) be given the opportunity to exclude themselves from any class action purporting to bind them with respect to their *in personam* claims for damages. In class actions seeking to bind plaintiffs with respect to claims seeking predominantly money damages, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). This is the issue that this Court granted certiorari to review in *Adams*. *Adams v. Robertson*, slip op. at 1.

The petitioners here are objectors to the class settlement who contend that the settling parties and the lower courts erred in relying on the settlement to recast claims for individual damages as claims for equitable relief that qualify for mandatory class treatment. Unlike *Adams*, here there is no issue of procedural default. *See* pp. 8-9, *supra*. In the instant case, the Fifth Circuit rejected petitioners' constitutional objections to the mandatory nature of this class action on the grounds that class members were not seeking damages, but instead sought equitable redistribution of a common fund. App.47a-48a. Yet, as Judge Smith pointed out, the panel majority expressly conceded that the complaint itself belies this characterization, because the "'central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages.'" App. 122a (quoting the panel majority). Furthermore, the district court "actually stated that '[the] claims were, prior to the settlement, in personam in character.'" App. 122a n. 56 (quoting the district court).

Unlike litigants bringing *in rem* actions for the accounting of a trust or for interpleader, class members here did not assert claims against any specific property or common fund. Nor were class members' claims pleaded against a defendant in receivership or bankruptcy. *Cf. In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992)(upholding mandatory class action seeking equitable redistribution of commonly held property in form of a bankruptcy trust, but recognizing that *Shutts* would forbid mandatory class treatment if members of plaintiff class were not all beneficiaries of the trust). As the panel majority admitted, this case "presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims." App. 42a. In contrast to *in rem* cases, where Rule 23(b)(1)(B) might appropriately and constitutionally be applied, in this case the class complaint asserted *in personam* claims for personal injury damages against a solvent defendant that merely faced a theoretical risk of insolvency — as does *any* company — dependent on the outcome of its insurance coverage dispute and future tort claims against it. Fibreboard's arrangement with its insurers can no more alter the status of this proceeding under Rule 23 than California's decision to "buy insurance to protect itself against potential tort liability" could alter its status under the 11th Amendment in *Regents of Univ. of Calif. v. Doe*, No. 95-1694 (February 19, 1997), 1997 U.S. Lexis 1268 at *11. The fact that a *legislature* may possess the sovereign power drastically to alter (or even eliminate) a party's right of action, *cf. Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-40, 448 (1934), does not mean that a court — which is bound by the Due Process Clause — may do so. *Cf. Logan v. Zimmerman*, 455 U.S. 422, 427, 432-33 (1982). The constitutional right to notice and a chance to opt-out cannot be extinguished by mislabeling this class action as a mandatory *in rem* case.

The second issue common to this case and *Adams* is the narrower argument that due process prohibits a court from exercising personal jurisdiction over class members asserting claims for damages who lack minimum contacts with the forum state, unless they have an opportunity to opt out. *See Adams v. Robertson*, slip op. at 4-5, 8 n.6 (noting Court's "continuing interest" in this issue). As Judge Smith noted (App. 86a & n.16), on this issue the decision

below is in direct conflict with precedent in the Third and Ninth Circuits. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism'd as improv. granted*, 511 U.S. 117 (1994); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768-69 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

This case thus presents important questions that this Court was unable to reach in *Adams v. Robertson*. Because these issues were squarely presented to, and in fact ruled upon by, the federal court of appeals below, this case is an ideal vehicle for consideration of those questions in the wake of the dismissal in *Adams*. Therefore, the petition should be granted.

III. HOWEVER THIS COURT DECIDES *AMCHEM*, AND INDEPENDENT OF THE DUE PROCESS ISSUE ON WHICH THE COURT GRANTED REVIEW IN *ADAMS*, CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FIFTH CIRCUIT'S RADICAL EXPANSION OF MANDATORY CLASSES UNDER RULE 23(b)(1)(B) VIOLATES THE RULES ENABLING ACT AND THE RULES OF DECISION ACT, AND ALLOWS CIRCUMVENTION OF RULE 23(b)(3) AND OF FEDERAL BANKRUPTCY LAW.

Because this case is a federal diversity jurisdiction class action brought pursuant to Fed.R.Civ.P. 23, there are a number of non-constitutional issues presented here that were absent from *Adams v. Robertson*, which was a state court class action in which the only federal question presented concerned the Due Process Clause. In the case at hand, principles of federalism and separation of powers, the Due Process Clause, the Rules Enabling Act, the Rules of Decision Act and Rule 23 itself all forbid mandatory class treatment of the individualized claims for damages alleged here.[9]

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[9] The due process component of this question was previously before this Court in *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994) (*per curiam*), in which this Court, dismissing certiorari as improvidently granted, indicated that there was "at least a substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-

As noted above, both the district court and the court of appeals below conceded that the complaint alleges only personal causes of action for damages and that the damages remedies set forth in the prayer for relief are paradigmatic legal — rather than equitable — remedies. App.122a & nn. 54-56. Nor are the class members' individual claims for money damages remotely akin to suits for injunctive relief under the civil rights laws or other litigation in which classes have been certified pursuant to Rule 23(b)(1)(A) and Rule 23(b)(2). In those situations, the plaintiffs have an undivided common interest (usually in injunctive relief to compel the defendant to act appropriately with respect to the entire class) at the outset of the case, when the complaint is filed, *before* any settlement is imposed. Those plaintiffs' claims to relief are not predicated, as the supposedly *in rem* claims are in this case, on an assumption that the settlement has already been implemented and now creates the very basis for those common claims. The claims asserted here are, at most, eligible (at least theoretically) for class treatment only under Rule 23(b)(3) (*but see* the Third Circuit's decision in *Georgine v. Amchem Products*). Yet the possibility of mass opt-outs from the class would spoil the insurers' and Fibreboard's attempt to rid themselves of all future asbestos liability, as they candidly admitted during the settlement negotiations. App. 9a-15a. Therefore, the settling parties and the courts below have tried to shoehorn these *in personam* damages claims into a Rule 23(b)(1)(B) class on the theory that they are in fact *in rem* claims "made by numerous persons against a fund insufficient to satisfy all claims." Advisory Committee Note to 1966 Amendment to Rule 23(b)(1)(B).

But here there is no fund — limited or otherwise — to speak of:

> The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from a "fixed asset ... in which all class members have a preexisting interest." ... Second, the plaintiffs do not have a preexisting interest in Fibreboard's assets; *the purpose of the suit is to establish those rights and not to divide preexisting rights.*

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out, and not under Rules 23(b)(1) and (b)(2), which do not." 114 S.Ct. at 1361.

App.86a-487a n.17 (Smith, J., dissenting)(emphasis added). When the district court admitted that the class "'claims were, prior to settlement, *in personam* in character,'" it was implying that, in its view, "the settlement transformed the claims into something other than *in personam* claims." App. 122a n.56 (Smith, J., dissenting)(quoting the district court). Thus, "[f]ar from adjudicating equitable rights in a preexisting fund, the settlement *creates* a common fund by extinguishing *personal* rights of action." App. 87a (emphasis in original).

The very purpose of the Global Settlement was to accomplish this reverse alchemy: to repeal the class members' existing common law *in personam* damage claims, which could not be brought within a non-opt-out Rule 23(b)(1)(B) class, and to replace them with *in rem* claims against a common, limited fund established by the settlement itself — claims that *could* be dragged into a mandatory class. Thus was gold turned to lead.

All of this was accomplished by the Fifth Circuit via the simple expedient of ignoring the actual *in personam* claims that the representative plaintiffs had to allege in order to confer jurisdiction on the district court, and fast-forwarding to the *in rem* claims against a limited common fund that were left *after* the settlement had been approved, and which were what the settling parties wanted to foist on the absent class members. The fund here was "limited" only by the bargaining powers of the insurance titans controlling this litigation. Rule 23(b)(1)(B) cannot be satisfied simply by the parties saying it is so. This blatant bootstrapping of a 23(b)(3) class into a 23(b)(1)(B) class is an astonishing example of the abuses possible if the federal courts are permitted to define and certify class actions exclusively by reference to a proposed settlement.

In this sense, the "limited fund" present here is akin to that present in *every* settlement. As Justice Souter observed in the *Amchem* oral argument, there is always "a kind of limited fund unless you assume that the defendants in these cases are simply standing in court saying, 'we'll pay anything they want — the sky is the limit.'" Tr.Oral Arg. in No. 96-270 at 14. Far from justifying Rule 23(b)(1)(B) treatment, the existence of these finite resources dooms the class action by creating inherently disabling intra-class structural conflicts.

Further, the Fifth Circuit's approval of class certification in this case works an enormous federal judicial usurpation of state legislative authority. In affirming the district court's certification of a "limited fund" class based on the settlement's creation of that very "fund," the Fifth Circuit ignored the federalism and separation of powers principles embodied in the Rules Enabling Act, 28 U.S.C. § 2072, and in the Rules of Decision Act, 28 U.S.C. § 1652.

Under the Rules of Decision Act, the class members' substantive rights in this diversity action are defined by "the laws of the several states." App. 526a. Under the Rules Enabling Act, the procedural rules promulgated by the federal courts cannot "abridge, enlarge or modify any substantive right." App. 525a. The application of Rule 23(b)(1)(B) to mass tort cases based on the potential future insolvency of the defendant abridges the substantive rights of class members by, as the Fifth Circuit candidly put it, "effect[ing] a pro-rata reduction of all claims." App.48a.

The substantive law does not permit such a pro-rata reduction with respect to *in personam* claims for damages against a defendant that is not in bankruptcy or receivership If petitioner Esteban Ortiz were to obtain a final judgment against Fibreboard for damages from his current asbestosis condition, state law would entitle him to execute that judgment against Fibreboard's assets as soon as the judgment became final, and no other member of this class could interfere with his collection of that judgment *in its entirety*. Outside of the bankruptcy context — which is a product of legislative, not judicial creation, and which is not present here — substantive tort law provides no relief for late-arriving claimants. Federal courts, however well intentioned, cannot use a rule of procedure to fashion such relief for public policy reasons.[10]

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[10]As one scholar has written with respect to a proposed revision of Rule 23:

> The settlement class action ought be seen as a substantive device comparable to bankruptcy. ... The bankruptcy laws of the United States are not made by rule of court, nor could they be. A moment's consideration of the problems of drafting a law to provide the desired alternative to bankruptcy reveals that many substantive entitlements are put at risk, while others are necessarily enlarged. This is not a task for judicial rulemakers. Those whose rights are affected are

Indeed, the Fifth Circuit's decision approving use of a mandatory class action under Rule 23(b)(1)(B) as a substitute for bankruptcy conflicts with the Second Circuit's decision in *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993). The Second Circuit rejected an effort by an insolvent asbestos defendant to impose a mandatory class action settlement upon future asbestos victims as a substitute for the substantive and procedural safeguards of bankruptcy. The Second Circuit emphasized that making pro rata adjustments of tort creditors' rights is not the appropriate role of the judiciary, even if the class action procedure might be "more efficient" than bankruptcy: "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." 14 F.3d at 733. The *Keene* court held that the asbestos defendant's attempted "evasion of the Bankruptcy Code" was impermissible because:

> [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

Id. at 732. Here, by contrast, the Fifth Circuit approved Fibreboard's legislative proposal to substitute a mandatory class action settlement for bankruptcy.

> entitled under the Constitution as well as the Rules Enabling Act to have such laws considered by duly elected representatives who are accountable to their constituencies.

See Memorandum from Duke Professor of Law Paul Carrington to the Standing Committee on Rules of the Judicial Conference of the United States, May 21, 1996, at 5. *See also* Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, 38 ARIZ. L. REV. (forthcoming 1997).

To be sure, the nominal arrangement of the parties is superficially different. In *Keene*, the asbestos manufacturer sought to invoke the subject matter jurisdiction of a federal court as a purported plaintiff, in order to impose a class action settlement upon its tort victims as a defendant class. In this case, Fibreboard is listed as the defendant. But as Judge Smith pointed out, that difference reflects no more than the fact that Keene Corporation was more forthright than Fibreboard:

> Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement.

App. 74a. The conflict between the decision below and *Keene*, and the implications of that conflict for federalism and the separation of powers, constitute a compelling, independent ground for this Court to grant the petition.

CONCLUSION

This case presents several issues of sufficient importance that this Court has already granted certiorari in other cases to resolve them. In addition, this case presents the first instance in which any federal court has certified a mandatory, settlement-only class action to resolve future tort claims. As Judge Smith recognized, the outcome here will have a lasting impact on the legal rights of tort victims throughout the nation:

> Ever since the district court's certification order, ... corporate America has been "anxiously awaiting" a decision in this case. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims."

App. 67a. Thus, although the combination of legal issues presented here is unique, it will not remain so for long if this Court leaves the

Fifth Circuit's decision unreviewed. Nor will other courts of appeals have an opportunity to rule on these questions in other cases. For by their very nature, nationwide settlement class actions can be filed anywhere in the country, and this case enshrines the Fifth Circuit as the venue of choice for mass tort defendants seeking to resolve all of their future liabilities in a single stroke.

For all these reasons, the writ should issue.

Respectfully submitted,

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I (Pp. 1 – 208.)

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

March 3, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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APPENDIX A

In re ASBESTOS LITIGATION

James FLANAGAN; David H. Middleton; Kenneth Smith; Edee Cochran; Esteban Yanez Ortiz; John R. Allgood; Henry William Evers; Lester Eugene Taylor; Plant Insulation Company; Safety National Casualty Corporation, Appellants,

v.

Gerald AHEARN; James McAdams Dennis; Charles W. Jeep; James Drake; James Ellison; Roland Dearborn; Judith Dearborn; Kerwin Butcher; Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor; Longshore Intervenor; William James Mitchell; Fibreboard Corporation; Bethlehem Steel Corporation; Continental Casualty Company; Pacific Indemnity; Francis McGovern; Owens-Illinois, Inc.; Penn Mutual LifeInsurance Company; Columbia Casualty Company; CNA Casualty Company of California; Celotex Corp., Daniel Herman Rudd, Jr., on behalf of themselves and others similarly situated; Beverly White, on behalf of themselves and others similarly situated; John Hansel, on behalf of themselves and otherssimilarly situated; Appellees.

Nos. 95-40635, 95-40694.

United States Court of Appeals,

Fifth Circuit.

July 26, 1996.

Leonard C. Jaques, Michael J. Connor, The Jaques Admiralty Law Firm, Detroit, MI, for appellants.

Elihu Inselbuch, Charles Sanders McNew, Caplin & Drysdale, Chartered, New York City, Steven Kazan, Kazen,

McClain, Edises, Simon & Abrams, Oakland, CA, for Ahearn, Dennis, Jeep, Ellison and Mitchell.
Harry Fred Wartnick, San Francisco, CA, for Ahearn, Dennis and Jeep, appellees.
Joseph F. Rice, Ness, Motley, Loadholt, Richardson & Poole, Charleston, SC,
Peter Van Lockwood, Caplin & Drysdale, Chartered, Washington, DC, Joseph B. Cox, Jr., Cox & Cox, Sullivan's Island, SC, for Ahearn, Dennis, Jeep and Ellison, appellees.
Eric D. Green, Boston, MA, for Dennis and Jeep, appellees.
Bruce L. Ahnfeldt, Napa, CA, for Juanita Drake, appellee.
Clinton A. Krislov, Krislov & Associates, Chicago, IL, Ronald W. Lupton, Stinson, Lupton and
Weiss, Bath, ME, for Roland and Judith Dearborn, Butcher and Longshore Intervenor, appellees.
Michael Scott Hertzig, Washington, DC, for Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, appellee.
Kelly C. Wooster, Stephen M. Snyder, William R. Irwin, James L. Miller, Brobeck, Phleger & Harrison, San Francisco, CA, for Fibreboard Corp.
Herbert Maurice Wachtell, Meyer G. Koplow, Wachtell, Lipton, Rosen & Katz, New York City, Donald T. Ramsey, David M. Rice, Rodney L. Eshelman, Carroll, Burdick & McDonough, San Francisco, CA, for Continental Cas. Co., Columbia Cas. Co. and CNA Cas. Co. of Cal., appellees in both cases.
Billy Glynn Parker, Ireland, Carroll and Kelley, Tyler, TX, for Continental Cas. Co., appellee.
Paul J. Bschorr, Richard B. Sypher, Dewey Ballantine, Dewey Ballantine, New York City, for Pacific Indemnity, appellee.

Richard L. Josephson, Baker and Botts, Houston, TX, Robert B. Shaw, Nelson Mullins Riley & Scarborough, L.L.P., Columbia, SC, for Owens-Illinois Inc., appellee in both cases.
Gary A. Bresee, Barger and Wolen, San Francisco, CA, for Penn Mutual Life Insurance Company, appellee in 95-40635.
Stuart Philip Ross, Ross, Dixon and Masback, Washington, DC, for Columbia Cas. Co. and CNA Cas. Co. of Cal., appellees.
Charles P. Schropp, Schropp, Buell & Elligett, Tampa, FL, for Celotex Corp., appellee.
Arthur H. Bryant, Anne W. Bloom, Trial Lawyers for Public Justice, Washington, DC, for Trial Lawyers for Public Justice, amicus curiae in both cases.
Jeffrey Robert White, Pamela A. Liapakis, Associated Trial Lawyers of America, Washington, DC, for Association of Trial Lawyers of America, amicus curiae in both cases.
Craig A. Berrington, David F. Snyder, James L. Kimble, American Insurance Association, Washington, DC, for American Insurance Association, amicus curiae in both cases.
Scott McCullen Baldwin, Baldwin & Baldwin, Marshall, TX, for Asbestos Victims of America, amicus curiae in both cases.
James E. Coleman, Jr., Diane M. Sumoski, John Andrew Martin, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, for Rudd, White and Hansel, appellees.
Robert L. Shaw, Westmoreland, KS, pro se.
J. Russell Stedman, Barger and Wolen, San Francisco, CA, for Penn Mutual Life Insurance Company, appellee in 95-40694.
Frederick M. Baron, Brent M. Rosenthal, Steve Baughman (argued), Baron & Budd, P.C., Dallas, TX, Sidney Katherine Powell (argued), S. Ann Saucer, Powell & Associates, Dallas, TX, for Ortiz, Cochran, Taylor, Allgood and Evers, amicus curiae.

Appeals from the United States District Court for the Eastern District of Texas.

Before REAVLEY, DAVIS and SMITH, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In this consolidated appeal, we consider a number of challenges to the district court's approval of a class settlement of future asbestos victims with Fibreboard along with several related settlements. For the reasons that follow, we affirm the district court's judgment.

I. BACKGROUND

A. Procedural and Factual History

Fibreboard, primarily engaged in the timber business, also manufactured asbestos-containing products from 1920 until 1971. By the late 1980's, asbestos-related personal injury and death claims against Fibreboard numbered in the tens of thousands. At that time Fibreboard had approximately $100 million in hard insurance assets available to pay these claims. It also had disputed coverage claims against two of its insurers, Continental Casualty Company and Pacific Indemnity. These coverage claims ultimately played a key role in the class settlement.

Continental issued a general liability policy to Fibreboard in 1957 which remained in force for two years. Although the policy had no aggregate limit, it had a per-occurrence limit of $1 million and a per-person limit of $500,000.

Fibreboard contended that Continental's policy replaced a similar Pacific policy with a per-claim limit of $500,000 but no aggregate limit. Fibreboard contended that these two policies provided coverage to Fibreboard for thousands of claimants. This argument rested on Fibreboard's "continuous trigger" theory which maintained that the policies covered Fibreboard if the claimant had been exposed to asbestos at any time before or during the time the policies were in force, provided the claimant at some time was exposed to Fibreboard's asbestos product.

In 1979, Fibreboard and other insureds filed a massive multi-party insurance coverage case in California state court against a number of insurers, including Pacific and Continental. Following years of litigation, including a trial extending over four years, Fibreboard prevailed in the trial court. In its 1990 opinion, the trial court accepted Fibreboard's continuous trigger theory as well as Fibreboard's argument that the insurer was required to pay the full cost of defense for each claim covered.

The insurers appealed to a California intermediate appellate court. Argument was held in August 1993 while the settling parties in this case were attempting to reach a final agreement.

By 1988, Fibreboard had largely exhausted its coverage from insurers other than Pacific and Continental. It was unable to pay asbestos judgments and settlements as they occurred and also pay the continuing mounting defense costs. After the trial court in the coverage case issued several rulings in favor of Fibreboard, Fibreboard was able to develop a "structured settlement" program where payments to settle

claims were deferred until resolution of the coverage case. Under this plan, most plaintiffs agreed to accept 40% cash up front with the balance due upon resolution of the coverage dispute. Additionally, Fibreboard agreed not to dissipate its assets and, in effect, to give the company to the plaintiffs if it lost its coverage case.

By mid-1990, Fibreboard's defense costs and settlement payments had mounted and Fibreboard looked for additional insurance resources. It proposed to both Continental and Pacific that they negotiate a complete settlement of its coverage claims. Continental declined to negotiate. Pacific, however, negotiated with Fibreboard and ultimately agreed to a settlement, "the Pacific Agreement." By this settlement, which was subject to a number of contingencies, Pacific's coverage was made available for claimants exposed to Fibreboard's asbestos products after 1959. The Pacific Agreement also purported to extinguish Continental's right to seek contribution from Pacific. Continental challenged this agreement in the District Court for the Eastern District of Texas in April 1993.

Even with the Pacific Agreement, Fibreboard faced acute problems with increased large-scale asbestos litigation. In early 1991 it proposed an "assignment settlement" plan to plaintiffs' counsel. Unlike the earlier program, this plan allowed asbestos claimants to settle their claims against Fibreboard for an agreed sum, receive no cash up front but rather receive an assignment of Fibreboard's rights (to the extent of the settlement) against Continental. Fibreboard agreed to pay the settlement sum if the court ultimately exonerated Continental. Under this plan, the settlement was also contingent upon Fibreboard obtaining court orders

validating its right to make an assignment in the face of an insurance policy provision barring Fibreboard from settling claims without Continental's consent. Plaintiffs' counsel recognized the risk that their clients would never receive the agreed-upon settlements under the assignment plan and pressed for higher settlement amounts for accepting this risk. Fibreboard, using Continental dollars, was willing to pay more. As a result, the average per-case settlement amount under the assignment plan more than doubled the average amount of the earlier structured settlements. Continental strongly disputed Fibreboard's right to make these assignments. This dispute led to further costly litigation.

In June 1992, a California trial court in *Andrus v. Fibreboard*[1] ruled in favor of Fibreboard and upheld Fibreboard's right to make the assignment settlements. The California intermediate appellate court denied writs, relegating Continental to review under the ordinary appellate process.[2]

In 1990 and 1991 Fibreboard broached the subject of a global settlement with Ron Motley, Joe Rice, Steven Kazan and Harry Wartnick, all of whom were leading plaintiffs' asbestos counsel. Fibreboard proposed to use an assignment plan to accomplish the global settlement. Fibreboard sought to structure the settlement so that claimants would look only to its insurance assets if it won the coverage case and

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[1]No. 614747-3 (Alameda Cty.Sup.Ct. June 1, 1992) *reversed* by *Fibreboard Corp. v. Continental Casualty Co.*, No. A059716 (Cal.App., October 19, 1994).

[2]The trial court's decision in *Andrus* was reversed by the California appellate court in October 1994 after the Global Settlement Agreement was reached but before the fairness hearing was held.

Fibreboard would give the company to claimants if it lost the coverage case. As Fibreboard's counsel later admitted at the fairness hearing, this approach was designed in part to "bring the [asbestos] litigation closer to Continental; it was important that Continental feel as threatened as Fibreboard did."

Fibreboard was not successful in negotiating a global settlement with plaintiffs' counsel. Fibreboard and the Ness Motley firm did, however, agree to settle at least 20,000 present asbestos claims with the possibility of expanding that number to a higher figure. Fibreboard again agreed to assign rights under the Continental policy instead of paying cash to fund this settlement. The higher settlement amounts necessary to accomplish these assignment settlements caused a further inflation of settlement values. With the conclusion of this Ness Motley settlement agreement, Fibreboard had entered into $943 million in assignment settlements during 1992 and had deferred settlement obligations at the end of that year aggregating over $1.2 billion, a sum that greatly exceeded its net worth.

As called for under this latest settlement, Fibreboard brought suit in the Eastern District of Texas seeking a determination that the assignment did not violate the Continental policy. Plaintiffs' counsel advised Continental that they had bound themselves contractually with Fibreboard to refrain from negotiating directly with Continental without Fibreboard's consent. Continental knew that Fibreboard and plaintiffs' counsel were actively engaged in negotiating a global settlement to be funded with Continental's money.

Thus, at the beginning of 1993, Continental was under intense pressure to join the settlement talks:

* Continental had been unable to obtain immediate review of the California trial court judgment in Andrus approving the unilateral assignment settlements.

* Fibreboard continued to close more and more assignment settlements at amounts Continental considered grossly excessive.

* Fibreboard and plaintiffs' counsel were seriously negotiating a multi- billion dollar settlement which Continental would be called upon to fund. And Continental was barred from the table.

* A new proceeding, in a forum Continental probably considered unfriendly, had been filed seeking validation of Fibreboard's assignment settlements.

In February 1993, Continental announced that it would seek a global resolution of its asbestos exposure under its Fibreboard policies. With the approval of the parties, Judge Parker named Judge Patrick E. Higginbotham of this court to serve as settlement facilitator.

In the settlement discussions with Judge Higginbotham, Continental made it clear from the beginning that it would only entertain a global settlement if the settlement brought "total peace." Continental was unwilling to pay billions in settlement and forego its substantial arguments against coverage without the assurance that it did not face unknown liabilities in the future. Thus, Continental

was only interested in exploring a mandatory, non-opt-out settlement. Continental considered that an opt-out class presented it with a number of insurmountable problems:

* Because the deadline for opting out would likely come after a decision in the coverage appeal, plaintiffs would enjoy a one-way option: they could opt out if Continental lost the appeal but remain in if Fibreboard lost.

* Claimants with the most serious injuries were likely to opt out in disproportionate numbers.

* Accurate predictions of Continental's exposure to opt outs were extremely difficult, if not impossible, to make.

Skirmishes between Continental and Fibreboard initially prevented fruitful discussion. Fibreboard argued that Continental was barred contractually from direct discussions with plaintiffs' counsel. Fibreboard also threatened to continue its assignment settlements.

With Judge Higginbotham's help, the parties agreed to put these impediments behind them in an agreement signed on April 9, 1993. Fibreboard agreed to allow Continental a place at the negotiating table and to stop the assignment settlements. Continental agreed to fund 100% of any global settlement (Continental reserved the right to get whatever contribution it could from Pacific) and to use its best efforts to work with Fibreboard to reach a global settlement.

From April until July the parties attempted to negotiate a global settlement but these efforts met with little success. For a number of reasons Judge Higginbotham recommended

and the parties agreed that they should first attempt to settle the Ness Motley inventory of some 45,000 present claims. On August 5, the parties reached the "Substitute Ness Motley Agreement" which was approved by the court on August 9.[3]

With the Ness Motley settlement behind them, the parties intensified their efforts to reach a global settlement. The August 27 date for oral argument in the California Court of Appeal in the coverage case injected a sense of urgency into these discussions. Plaintiffs' counsel realized that if Fibreboard lost the coverage case, Continental's funds, essential to any settlement, would be lost. Fibreboard faced immediate bankruptcy if it lost the coverage case. Continental and Pacific faced staggering liability in an unquantifiable amount if they lost the coverage case. The parties had reason to believe that the California appellate court would render a decision promptly after argument and perhaps give signals at argument on how it would rule. For these reasons all parties were driven to reach a settlement before the California court reached a decision in the coverage case.

At Judge Higginbotham's request, Judge Parker designated Messrs. Rice, Cox, Kazan, and Wartnick to "negotiate ... the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard."

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[3]In the Substitute Ness Motley Agreement, Continental agreed to pay a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. This agreement was used as a model to settle inventory claims of other law firms.

A series of intense negotiating sessions followed. The absence of Pacific at the table remained a serious impediment and little progress was made. Over the weekend of August 21-22, faced with an impending trial on Continental's claims to invalidate the Pacific Agreement, Pacific agreed to share responsibility with Continental on a 35.29% to 64.71% ratio. This was the same ratio established by the trial court in the coverage case.

This proved to be the last impediment to an agreement. Continental and Pacific were now negotiating jointly. By August 23, Continental and Pacific (the Insurers) had offered $1.5 billion and plaintiffs' counsel demanded $1.7 billion. The parties asked Judge Parker to assist in a last-ditch effort to reach agreement before August 27.

Judge Parker and counsel spent the afternoon of August 26 in intensive negotiating sessions in an attempt to resolve the remaining differences between the parties. Late in the afternoon when settlement had not been reached, Judge Parker invited a core group of attorneys to his home outside of Tyler to continue the discussion. After several hours of negotiations in this more informal setting, Continental agreed to contribute an additional $25,000,000 and Fibreboard agreed to contribute $10,000,000. Plaintiffs' counsel refused at this point to accept the $1.535 billion pot. But later, the key parties, by coincidence, met around midnight at a Tyler coffee shop. Plaintiffs' counsel, at that time, agreed to accept the tendered $1.535 billion global settlement offer.

On the morning of August 27, plaintiffs' counsel renewed a demand that there be a separate, back-up settlement between Fibreboard and the Insurers for the settlement of the

coverage case if, for any reason, a court declined to approve the global settlement. The parties negotiated the entire day on August 27. Near the end of the day a settlement (termed the "Trilateral Settlement") among Continental, Pacific and Fibreboard was reached. These negotiations were undoubtedly shortened because the coverage case appeal was argued on the morning of August 27. The negotiating representatives received word after the argument that the court had announced that it intended to decide the case expeditiously.

Upon announcement of the settlement agreement in open court in Tyler on August 27, the parties directed communication to the California Court of Appeal advising the court of the agreement in principle.

The parties asked the California court to defer a ruling on the issues relating to Fibreboard's dispute with Continental and Pacific pending completion of the necessary settlement documentation. The California Court of Appeal has continued to withhold a ruling pending final approval of the Trilateral Settlement.[4] The parties then set out to convert the Global and Trilateral Settlements into formal written agreements. They first addressed the Trilateral Settlement. Disputes arose over critical features of this agreement and it was not until October that Continental, Pacific and Fibreboard were able to reduce it to writing.

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[4]After oral argument, the court granted a motion to sever issues unique to Fibreboard, Pacific and Continental in order to facilitate the Trilateral Settlement. Its decision regarding the claims of other participants in the case is *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co. et al.*, 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690 (1996).

On September 9th, the *Ahearn* class action was commenced by the Global Health Claimant Class against Fibreboard. The Global Health Claimant Class consists of all persons with personal injury claims against Fibreboard for asbestos exposure whose claims had not been brought in a lawsuit, settled or included in a settlement agreement before August 27, 1993. Shortly after *Ahearn* was filed, Judge Parker entered a number of orders: Continental and Pacific were granted leave to intervene as party defendants; provisional class certification was granted; a TRO against commencement of further separate litigation against Fibreboard by putative class members was entered; and the court appointed as counsel to the plaintiff class, Rice, Cox, Kazan and Wartnick, and appointed Caplin & Drysdale as counsel to plaintiffs' counsel.

In October, Judge Parker appointed Professor Eric Green of the Boston University School of Law to serve as guardian ad litem for the class. Judge Parker noted

> that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the class and thereby to afford the class additional assurance that their interest will be adequately protected.

Professor Green was directed to render a report to the court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of the members of the provisionally certified Global Health Claimant Class.

Plaintiffs' counsel then turned to documenting the Global Settlement Agreement. The parties did not resolve the hundreds of details necessary to complete this document until December 23. As Judge Parker noted, it was not until that date when the Global Settlement Agreement was signed that it became "clear that a final agreement would actually be reached."

B. Terms of the Settlements

1. The Global Settlement Agreement

The Global Settlement Agreement provides for the establishment of a trust, funded with $1.535 billion--the proceeds of the settlement. The trust is charged with administering and paying all of the Global Health Claimant Class members' asbestos-related personal injury and death claims against Fibreboard and the Insurers. Once the global settlement receives judicial approval, and the trust is fully funded, the Class members' claims against Fibreboard and the Insurers will be directed to the trust for processing and payment according to the procedures provided in the trust distribution process.

The trust is to be managed by three trustees and subject to the general supervision of the court.

The Global Settlement Agreement seeks to provide, through the trust, a simple process for injured persons to quickly obtain a fair resolution of their claims and at the same time safeguard their ultimate right to resort to the tort system. The settlement further seeks, through spendthrift provisions, to limit the amount of the trust assets that can be paid out in any given year.

This will protect assets so that they will be available to compensate injured class members whose claims develop far in the future. If a shortfall occurs in any year, payments during that year are prioritized so that the sickest claimants are paid first.

Under the Global Settlement Agreement, a claimant must first seek to settle with the trust after providing requisite information to allow for evaluation of his claim. If no settlement is reached, the claimant will next proceed to mediation to attempt to resolve his differences with the trust. If the mediation fails, the claim will be submitted to arbitration, either binding or non-binding at the claimant's choice. If non-binding arbitration does not result in a resolution of the claim, a judge or judge's designee from the Eastern District of Texas will hold a settlement conference. If this does not produce a settlement, the claimant may proceed against the trust in the tort system, complete with a jury trial if requested. The recovery of the claimant in the tort system, however, is subject to a cap of $500,000 per claim and recovery of punitive damages is precluded. Attorneys' fees for claimant's counsel are limited to 25% of the compensation paid to the claimant. Any resulting judgment will be paid out over a period of years depending upon the financial condition of the trust at the time.

As consideration for their $1.535 billion payment, Fibreboard and the Insurers receive full releases from the Global Health Claimant Class for their asbestos-related claims. Fibreboard and the Insurers also release each other from all claims.

2. The Global Third-Party Claimant Class Settlement

This settlement is between representatives of Fibreboard's major co-defendants on the one hand and Fibreboard and its Insurers on the other. The settlement preserves credit rights for co-defendant third parties under the law of the forum. Where the claimant liquidates his claim against the trust before proceeding to judgment against the co-defendant third party, the third party receives whatever credit local law allows against the judgment. Any third- party co-defendant who suffers a judgment before the trust settles with the plaintiff and pays a Fibreboard share, succeeds to the plaintiff's rights against the trust, except for exit to the tort system. The Global Third-Party Claimant Class releases Fibreboard and the Insurers as to all third-party claims for contribution and indemnity arising from the claims of Global Health Claimant Class members and agrees that approval of the Global Settlement Agreement will bar and enjoin Global Third-Party Claimant Class members from prosecuting any such claims against Fibreboard or the Insurers. Fibreboard and the Insurers in turn, release the Global Third-Party Claimant Class from any and all contribution and indemnity claims.

3. The Trilateral Settlement Agreement

The Trilateral Settlement Agreement compromises the longstanding coverage disputes between Fibreboard and the Insurers, Continental and Pacific. This settlement is to remain effective even if the Global Settlement Agreement ultimately fails to obtain judicial approval. With limited exceptions, the Trilateral Settlement fully discharges the Insurers from all of their Fibreboard policy obligations--both personal injury and non-personal injury claims. The Trilateral Settlement is not designed to settle any asbestos claims against Fibreboard. If the

global settlement for some reason fails, the asbestos claimants may pursue Fibreboard in the tort system. If the Global Settlement Agreement is not finally approved but the Trilateral Settlement Agreement is, the Insurers will make available to Fibreboard a total of $2 billion to enable Fibreboard to defend and resolve asbestos-related claims filed against it.

C. Notice and Hearing

After a comprehensive campaign designed to give notice of the proposed settlements, the district court allowed wide-ranging discovery. The court allowed the Ortiz and Flanagan appellants to intervene to assist in making the record "relating to the fairness, reasonableness and adequacy of the proposed settlement--to assist the court in its ultimate decision in this case."

Thereafter the court held a comprehensive eight-day fairness hearing. In addition to issues relating directly to the adequacy of the settlement fund, the court heard expert testimony on the potential outcome of the coverage case appeal. Two experts, retired California Supreme Court Justice Marcus Kaufman and Yale Law Professor, George Priest, gave opinions that Fibreboard's trial court victory on coverage would be reversed by the California appellate courts. These witnesses testified that Fibreboard faced a substantial risk that its extensive assignment settlement program constituted a massive breach of the policy.[5]

Following the hearing, the court made detailed findings and concluded that the Global Settlement Agreement was fair,

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[5]*See* discussion of *Andrus* at note 2 and accompanying text.

adequate and reasonable to the class and that the requirements for mandatory class certification under Federal Rules of Civil Procedure 23(b)(1)(A), (b)(1)(B) and (b)(2) were met. *D. Rudd*

After the Trilateral Settlement between Fibreboard and the Insurers was reached, the Insurers insisted upon a judicial determination that the settlement was fair, reasonable and non-collusive and operated to terminate any rights claimants might otherwise have against the Insurers arising out of the policies. The Rudd action was filed to accomplish this purpose. The Insurers thus brought a declaratory and injunctive action in the Eastern District of Texas against two mandatory (non-opt-out) defendant classes: (1) the Trilateral Health Claimant Class--substantially the same as the Ahearn futures class, and (2) the Trilateral Third-Party Claimant Class, comprised of third parties with asbestos-related claims against Fibreboard. The district court appointed experienced counsel to represent each class.[6] Notice was then given to the classes informing them of the pendency of the action. Broad discovery was conducted and trial was held on February 13, 1995.

Following trial, the class representatives and counsel for both of the defendant classes advised the district court that they had concluded that it was in the best interest of these classes to consent to the relief the Insurers were seeking. Counsel filed position papers explaining their reasons. Notice of the class representatives' consent to the terms of the Trilateral Settlement was sent to the members of the two classes. Following a fairness hearing, the district court issued findings of fact and

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[6]Class counsel for the Trilateral Health Claimant Class was James E. Coleman, Jr., of the law firm Carrington, Coleman, Sloman & Blumenthal, L.L.P. Class counsel for the Trilateral Third-Party Claimant Class were the same attorneys that represented the Global Third-Party Claimant Class.

conclusions of law approving the classes' consent and certifying both classes as mandatory non-opt-out defendant classes pursuant to Rules 23(b)(1)(A), (b)(1)(B) and (b)(2) of the Federal Rules of Civil Procedure. Only two individuals represented by Leonard C. Jaques, Esq., challenge the district court's orders in this appeal. No member of the Trilateral Third-Party Claimant Class and none of the other intervening parties in *Ahearn* have lodged objections to *Rudd*.

II. AHEARN

Appellants challenge *Ahearn* on a number of grounds which we consider below. The Ortiz intervenors are members of the Global Health Claimant Class who challenge certification of the class and the approval of the settlement. The Flanagan intervenors, also members of the Global Health Claimant Class, challenge certification in Ahearn and raise several objections specific to Rudd. We will refer to both groups of appellants collectively as "the intervenors."

A. Rule 23(a)

Rule 23(a) lists four prerequisites to a class action: (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation. The district court found that all four of these prerequisites were satisfied. The intervenors do not dispute the district court's finding of numerosity, but argue that the Global Health Claimant Class meets none of the other prerequisites to a class action.

The intervenors argue that the district court erred by considering the circumstances surrounding the settlement and the evidence adduced at the fairness hearing in making findings under Rule 23(a). This argument is contrary to Fifth Circuit

precedent and would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class. In *In re Corrugated Container Antitrust Litigation (Container I)*, we held that the district court should consider the settlement in deciding whether the settlement class satisfied the prerequisites of Rule 23. 643 F.2d 195, 211 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir.1981), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294, and *cert. denied*, 456 U.S. 1012, 102 S.Ct. 2308, 73 L.Ed.2d 1309 (1982). We rejected a challenge to the district court's finding that the class was adequately represented as required by 23(a)(4) and found that the terms of the settlement were vitally important to the determination that certification was appropriate. *Id.* Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied. See *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir.1985) (certification appropriate because "the interests of the broadened class *in the settlement* were commonly held") (emphasis added); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir.1994) *cert. denied* --- U.S. ----, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995) ("adequacy of class representation ... is ultimately determined by the settlement itself"); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir.1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself"); *In re A.H. Robins Co.*, Inc., 880 F.2d 709, 740 (4th Cir.) *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989) ("if not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"). Only the Third Circuit has refused to look at settlements before it when deciding class certification issues and even that court admits that taking the settlement into account may be "the better policy." *Georgine v. Amchem*

Products, Inc., 83 F.3d 610, 617-18 (3d Cir.1996). The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint. See Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* §11.28 at 11-58 (3d ed. 1992) (in settlement class context, common issues arise from the settlement itself).

We are bound to follow Container I's holding that the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry. We would adopt this rule even if we were not bound by precedent because it enhances the ability of district courts to make informed certification decisions.

1. Commonality and typicality

The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:

> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that

provide for payments to claimants in an equitable manner.

The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in *Container I*. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 472 (5th Cir.1986). The district court found that the legal and remedial theories of the representative plaintiffs were typical of the class because all members of the Global Health Claimant Class presented claims based on exposure to Fibreboard asbestos. The district court also found that the named plaintiffs' interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation were identical to interests held by all members of the class.

The intervenors do not argue that the named plaintiffs' claims rest on theories different from those of the other class members. Instead, in their attempt to show that the class is too diverse to meet the typicality requirement, they point to individual issues such as varying family situations, separate histories of cigarette smoking, differences in medical expenses

and differences in state law. These differences will certainly result in significant differences in the amount of damages that each claimant recovers but do not affect the settlement in the least. The Global Settlement Agreement does not award damages to individual victims:[7] it provides money and an equitable distribution process to pay victims.[8]

The central remedial and legal theory of each of the named plaintiffs, that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos, is typical of the entire class. Even the definition of the class makes this clear.[9] Further, the issues that brought the named plaintiffs to settle *Ahearn* are the same issues that the district court found common to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage

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[7]Determinations of individual damage awards will be made by the trust and the plaintiff's attorney in settlement negotiations or in a full trial on the merits. The back-end opt out provision will force the trust and plaintiffs to consider state law and individual circumstances, such as smoking history, when negotiating damages because the alternative to agreement is a full trial by jury under relevant state law.

[8]This is in stark contrast to the *Georgine* case where the settlement attempted to award damages to class members based on the severity of their injuries alone, 83 F.3d 610 (3d Cir.1996). We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In *Ahearn*, only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in *Georgine*.

[9]The Global Health Claimant Class consists of persons who have been exposed "to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability...."

litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class. We are satisfied that the district court did not abuse its discretion by finding that the issues of law and fact faced by the named plaintiffs were typical of the Global Health Claimant Class.

2. Adequacy of representation

The intervenors argue that the district court should not have certified the Global Health Claimant Class because of impermissible conflicts of interests by class counsel.[10] Rule 23(a)(4) states that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." This requirement for fair and adequate representation encompasses both class representatives and class counsel. *North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n. 4 (5th Cir.1979). However, "[j]ust what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir.1977), citing *Johnson v. Georgia Highway Express Inc.*, 417 F.2d 1122 (5th Cir.1969). The district court has the continuing duty to see that the class is adequately represented. *Guerine*, 544 F.2d at 864.

A district court may not certify a class without concluding that class counsel are " 'qualified, experienced, and generally able to conduct the proposed litigation.' Obviously, an attorney who should be disqualified because of a conflict of

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[10]Intervenors do not challenge the adequacy of representation of class representatives so we do not consider this issue.

interest will not meet this requirement." *North Amer. Acceptance*, 593 F.2d at 644 (quoting *Johnson v. Georgia Hwy. Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir.1969)).

In August 1993, the district court, on the recommendation of Judge Higginbotham, formally appointed four counsel (Messrs. Rice, Cox, Kazan, and Wartnick) to represent the Global Health Claimant Class. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. firms representing asbestos claimants. Ness Motley has been engaged in litigation with Fibreboard since 1990. Mr. Kazan is a partner with Kazan, McClain, Edises, & Simon. He has handled asbestos-related cases for about twenty years. Mr. Wartnick is a member of the law firm of Wartnick, Chaber, Harowitz, Smith & Tigerman. His practice has been devoted to representing asbestos claimants since 1981. In addition to their experience in asbestos litigation generally, Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located. The appointed class counsel retained the firm of Caplin & Drysdale to advise them in areas outside their own expertise.

The district court found that these counsel are "prominent attorneys, highly respected for their knowledge, experience, skill and special competence in the field of asbestos litigation" and that they provided "adequate, professional and ethical representation" to the class.

The intervenors do not question the skill, competence or experience of class counsel, but instead argue the existence of impermissible conflicts that prevented them from adequately representing the class. Both sides agree that in determining the existence of a conflict, we look to the ABA Model Rules of Professional Conduct for guidance. Rule 1.7 states:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct, Rule 1.7(b).

At the fairness hearing, the intervenors and the settling parties each called a legal ethics expert to express an opinion on whether class counsel had conflicts.

The intervenors offered Professor John Leubsdorf, a law professor at Rutgers University Law School who has taught courses in civil procedure and legal responsibility. The district court qualified Professor Leubsdorf as an expert on issues of legal ethics and professional responsibility but found him lacking in practical experience in mass tort litigation.

The settling parties called Professor Geoffrey Hazard, a law professor at the University of Pennsylvania Law School and a recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation and a reporter to the commission responsible for the preparation of the ABA Model Rules of Professional

Conduct. Moreover, Professor Hazard has previously testified in asbestos cases and has extensive experience as a consultant in this type litigation.

After hearing the testimony of both the legal experts and the negotiators, the district court credited Professor Hazard's testimony as "consistent with existing federal legal principles and the underlying facts of this case." The court found that Professor Leubsdorf's testimony in a number of areas was either not supported by the factual record or contrary to settled federal law. Also, the district court felt that Professor Leubsdorf's conclusions and recommendations often were speculative and impractical because of his insufficient experience in mass torts and asbestos litigation. The record amply supports these findings.

The intervenors argue that class counsel for the Global Health Claimant Class had impermissible conflicts due to concurrent representation both (1) of present asbestos claimants and the Class of future claimants and (2) of purported conflicting subgroups within the class.

a. Alleged conflict between present claimants and the class

The intervenors contend that class counsel by simultaneously representing both present claimants and the class of future claimants represented clients who were directly competing for Fibreboard's limited resources. The district court found that during the negotiations no conflict existed that materially limited counsel's responsibilities to the future claimant class.

In analyzing whether a conflict existed, both Professor Hazard and the guardian ad litem appointed for the futures class, Professor Eric D. Green, divided the three-year negotiations

period into smaller discrete time periods: (1) Early 1991 through April 9, 1993; (2) April 9, 1993, through August 9, 1993; (3) August 9, 1993, through August 27, 1993; (4) August 27, 1993, through October 12, 1993; and (5) October 12, 1993, through December 23, 1993.

(i) Early 1991 through late March 1993

Most of the settlement discussions until late March, 1993 were between only Fibreboard and class counsel. The Insurers did not participate. These exploratory discussions focused on a possible settlement with both present and future claimants combined in an opt-out class. Fibreboard was still seeking to settle by assigning its insurance rights to the class. During this time, Fibreboard continued to settle various law firms' "inventories" of present claims, including claims with the law firms of the four class counsel. Again, Fibreboard accomplished these settlements by assigning its insurance rights against Continental and Pacific; thus, these settlements were contingent on a favorable decision for Fibreboard in the California coverage case.

During this period, Fibreboard executed the initial Ness Motley agreement which settled approximately 20,000 inventory claims with the Ness Motley firm. This agreement required Fibreboard to obtain Continental's consent to this assignment of insurance rights or to seek a court order approving the assignment. In January 1993, Fibreboard filed suit against Continental in the Eastern District of Texas to obtain the court order.

Professor Hazard testified that during this time period no conflict existed between the present and future claimants because all discussions of a global settlement included both

groups and both groups shared the risk of losing the coverage case. If coverage was found and if assignment was not a breach of contract, then the insurance policies of Continental and Pacific offered potentially unlimited coverage.

(ii) April 1993 through August 9, 1993

In March 1993 Continental joined the negotiations and Judge Parker appointed Judge Higginbotham as a settlement facilitator. In an April 9, 1993 agreement, Fibreboard agreed to stop executing assignment settlements and Continental agreed to work toward a global settlement of all present and future claimants, including both pre- and post-1959 exposed claimants. But Continental insisted that the settlement be a mandatory, non-opt-out class and that Pacific contribute to the total settlement fund. Class counsel began to consider a mandatory class, but only if the settlement proceeds were adequate to insure fair restitution to present and future claimants and if a back-end opt-out provision was included. During this period, Continental filed suit in the Eastern District of Texas against both Pacific and Fibreboard seeking a declaration that the Pacific Agreement did not impair Continental's contribution rights against Pacific.

Fibreboard, now joined by Continental, continued negotiations on inventory claims. Specifically, Fibreboard and Continental began negotiations with the Ness Motley firm on a revised Ness Motley agreement. The parties succeeded in reaching the Substitute Ness Motley Agreement on August 5, 1993. Generally, Continental agreed to a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. Other inventory settlements were modeled after the Substitute Ness Motley Agreement.

Now that Fibreboard's suit against Continental concerning the initial Ness Motley agreement was settled, Continental sought an immediate trial of its suit against Fibreboard and Pacific. Continental's primary objective was to motivate Pacific to join the global settlement negotiations.

The intervenors argue that an impermissible conflict existed because the Ness Motley counsel were simultaneously negotiating for both present claimants (the inventory claims) and the class of future claimants. Professor Hazard testified that the present and future claimants were not competing for the same funds. At this stage of the negotiations, counsel were concentrating on the settlement of their inventory of present claims. It is true that they were also discussing a global settlement, but these discussions were in the preliminary exploratory stage. Certainly, at this time, counsel had no well-formed notions of how much Continental was willing to pay to settle the future claims.[11] For this reason, Professor Hazard explained that each attorney in good faith was attempting to obtain the maximum dollar amounts for present claimants he represented, as well as for the future claimants. Counsel certainly knew in a general way that there was a sum beyond

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[11] As Professor Hazard testified:

Q Well, to your knowledge, did the reality ever occur here to the plaintiff's lawyers that there would not be enough money to pay all future claimants?

A. They confronted a situation in which there was an external event creating a severe risk that that could happen. If Fibreboard won the coverage litigation without qualification as to the extent of the coverage, then there was enough money to the extent of the insurance company's resources, which I take it for practical purposes [sic] without limit; that is they would have to charge present policyholders to pay the money, but presumably if they stayed in the business they could do that.

which Continental would not pay. But because they did not know that limit, they did not know that this limit would be less than an amount they were willing to accept in settlement for both classes of claimants.[12] As the district court found, the Substitute Ness Motley Agreement likely aided the global settlement by increasing the average value per claim. We are persuaded that the record supports the district court's conclusion that class counsel vigorously represented both the present claimants and their future claimant clients against the same defendant.

(iii) August 9, 1993, through August 27, 1993

On August 9, 1993, on the recommendation of Judge Higginbotham, the district court appointed Messrs. Rice, Cox, Kazan, and Wartnick to negotiate the prospect of a settlement

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[12]Professor Hazard discussed the difference between the real-world concept of conflict of interest with the imaginary concept of a reserve price:

> Q. That's your opinion, whether or not there's an ethical violation depends upon the reasonableness of the settlement? Is that right?
>
> A. It depends--I think the judge said--I think I heard him to say the circumstances. That is, the conflict of interest is a real-world concept, not a theoretical concept. Therefore, one has to consider the real-world circumstances. Economists do a lot of thinking about--how shall we say-- the potential of reality. A reserve price in the context of real-world negotiation is an imaginary number. The person who offers the money finally doesn't know what he is going to offer until he offers it. He may have the clearest idea, the firmest opinion, the strongest wish, and yet you can have a settlement or there will be a few bucks more. How do you possibly reconcile the notion that he had a firm, irreducible, unremovable, firm reserve price with the fact that he settled for a little bit more? It's because you're talking about different kinds of things.

class composed of future claimants. The court knew that this settlement would have to be reached before the decision in the coverage case, which was expected on August 27, 1993. The court felt compelled due to this severe deadline and to the complexity of the issues to appoint only highly competent and experienced attorneys who understood asbestos litigation. Professor Leubsdorf testified that the court should have required all class counsel to settle their present claims for cash or should have appointed other counsel. The district court did not err in concluding that this suggestion was impractical and would have seriously impeded any settlement.

From August 9, 1993, to August 27, 1993, appointed counsel negotiated a global settlement. On August 22, 1993, Continental and Pacific reached an agreement to settle their dispute, vastly improving the odds of a global settlement. The district court found that all negotiations during this time were vigorous, contentious, and at arm's length. Professors Hazard and Green both testified that the future claimants were not impaired by counsel's representation of present claimants during this period. Indeed, they found that the present claimants had a substantial interest in a global settlement because such a settlement would secure their contingent back-end payments under the Substitute Ness Motley Agreement. Class counsel were also aware that any class settlement must be approved by the court and would face meticulous scrutiny. Thus, the present and future claimants had two common interests in reaching a settlement. First, they both wanted to avoid the risk of Fibreboard losing the coverage case. Second, they both wanted a diligently negotiated settlement: the future claimants wanted the settlement that yielded them maximum dollar recovery; the present claimants wanted a settlement that would withstand intense judicial scrutiny.

(iv) August 27, 1993, through October 12, 1993

From August 27, 1993, after announcing the Global Settlement Agreement in principle in open court, until October 12, 1993, when the Trilateral Settlement Agreement was reached, class counsel conducted no negotiations on the terms of the Global Settlement Agreement. On October 12, 1993, the district court appointed Professor Green as the guardian ad litem of the futures class.

(v) October 12, 1993, through December 23, 1993

From October 12 to December 23, 1993, when the Global Settlement Agreement was executed, the settling parties negotiated the specific terms of the agreement. By this time, the Trilateral Settlement Agreement had already been executed and would have triggered the back-end payments for the present clients in the Ness Motley or similar agreements even if the global settlement failed. Thus, the present clients' settlement was secured and they no longer had an interest in a global settlement. The record supports the district court's finding that the negotiations during this period were vigorous and that the class was adequately represented.

Thus, the district court considered the intervenors' conflicts argument for the entire time the settlement negotiations were underway and found that, at no time, did a material limitation on the representation of the class by class counsel exist due to concurrent representation of present and future claimants. The court did not err in reaching this conclusion.

b. The alleged intraclass conflicts

On appeal, the intervenors assert only two claims of intraclass conflict: (1) interests of class members who presently have an asbestos- related illness (the "near" futures) and members whose illness will not be apparent for many years (the "far" futures); and (2) interests of class members exposed pre-1959 and members having only post-1959 exposure.

Whether a conflict exists is governed by Rule 1.7(b) as discussed above. Not every intraclass conflict, however, will preclude approval of the settlement for inadequate representation. *See Container I*, 643 F.2d at 207- 08.

The district court found that neither subclasses nor separate negotiating attorneys were required because no material intraclass conflict existed. The court found the common interests far outweighed any divergent interests the intraclass groups might have. The court enumerated those common interests as follows: avoiding the catastrophic results of a loss by Fibreboard in the coverage case appeal; maximizing the total settlement contribution from Fibreboard and the Insurers; streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; minimizing the percentage of their compensation diverted from the fund to pay attorney's fees; and adopting procedures that provide for payments to claimants in an equitable manner.

Intervenors suggest two intraclass conflicts. First, they argue that the "near" futures would prefer a settlement agreement that places no limits on the amount an individual may recover because these claimants do not anticipate that Fibreboard's assets will be depleted before their claims mature. The "far" futures, on the other hand, would prefer to limit

individual claims to conserve funds so that resources will be available to pay for their future illnesses.

Professors Hazard and Green found no conflict between these two groups that would materially impair the performance of class counsel. Specifically, each found that the common interest in avoiding a lack of coverage vastly overwhelmed any differences between these groups. The "near" futures have no assurance that they would fare better in the absence of the Global Settlement Agreement. These claimants would face the risk that Fibreboard would live up to its pledge to actively defend any claims and delay any recovery. These claimants would also face the risk of attrition of available funds from increased legal fees. Under the Global Settlement Agreement the entire class is benefited by the greater likelihood that funds will be available to compensate both "near" and "far" future claimants under a less complicated system.

The intervenors rely on *In re Joint Eastern & Southern District Asbestos Litigation (Findley)*, 982 F.2d 721 (2d Cir.1992) to support requiring subclasses for the "near" and "far" futures. In a settlement trying to save the Manville Trust from insolvency, the Second Circuit held that subclasses were required for a Rule 23(b)(1)(B) non-opt-out class because of clear conflicts between class members. More particularly, the Second Circuit did require subclasses for groups comparable to our "near" futures and "far" futures. But the terms of the Manville Trust required that conclusion: significantly, the Second Circuit opinion makes it clear that a "near" future claimant was assured of recovery under the Manville Trust instrument if the claim was filed before the Trust ran out of money because the Trust operated on a strict order-of-filing priority. The settlement abandoned this priority to the prejudice of the near futures. Counsel, in negotiating such a settlement,

had a clear conflict between the "near" futures whose recovery rights were secure and the "far" futures who had no such security. As explained above, our "near" future claimants without the Global Settlement Agreement are not assured of a priority payment and have no assurance that funds will be available or when funds can be obtained if they are required to litigate with Fibreboard.

Next, intervenors argue that counsel could not represent claimants who were exposed before 1959 and after 1959 in negotiating a global settlement. They contend that this conflict exists because a pre-1959 exposure claimant's case has a higher settlement value than a post-1959 exposure claimant's. This is premised on the argument that pre-1959 claimants have a greater likelihood of available insurance coverage because both Continental and Pacific insurance policies covered only pre-1959 asbestos exposure. The Intervenors recognize that the Pacific Agreement gave Fibreboard $330 million to use in post-1959 claims. They argue however that Continental affords potential unlimited fund coverage to the pre-1959 claimants.

Professors Hazard and Green both found no substantial conflict between pre- and post-1959 claimants. Both pre- and post-1959 claimants share the common class interests recited above. Neither the Substitute Ness Motley Agreement, the Trilateral Settlement Agreement, nor the Global Settlement Agreement distinguish between these two groups of claimants in any way. To distinguish between the two groups in the Global Settlement Agreement was impractical because the class had no chance of persuading Fibreboard to agree to a settlement that did not address the claims by both groups. Also, to maintain the distinction in the Global Settlement Agreement would have undermined the attempts to provide maximum compensation and an efficient, streamlined process to claimants.

The district court made the following findings of fact: (1) all negotiations were vigorous and at arm's length, often conducted under the auspices of Judge Higginbotham; (2) common interests within the class overwhelmed minimal conflicts; (3) the settlement treated all class members the same; and (4) the Global Settlement Agreement was fair and reasonable, a finding that the intervenors have not appealed. The independent guardian ad litem also found that class counsel had no conflicts and that the Global Settlement Agreement was fair and reasonable and was the best alternative available. The district court did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required.

B. Certification Under 23(b)(1)(B)

We turn next to the intervenors' challenge to class certification under 23(b)(1)(B).

Rule 23(b) states that where the prerequisites of 23(a) are met, a class action may be maintained if (1) the prosecution of separate actions by or against individual members of the class would create a risk of

> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed.R.Civ.P. 23(b).

The district court found that the prosecution of separate actions by members of the Global Health Claimant Class would substantially impair or impede the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets. This finding has strong support in the record and is not clearly erroneous. The district court heard expert testimony on the probable number, mix and timing of future asbestos personal injury claims against Fibreboard, the anticipated costs of defense relating to such claims, and the present value of Fibreboard's non-insurance assets. The experts agreed that Fibreboard faced enormous liability and defense costs that would likely equal or exceed the amount of damages paid out. More importantly, these experts testified that even under the Trilateral Settlement Agreement where Fibreboard is given $2 billion in insurance money to add to its own value of approximately $235 million, Fibreboard would be unable to pay all the valid claims against it within five to nine years. The district court credited the testimony of these experts and found that Fibreboard is a limited fund.

1. Rule 23(b)(1)(B) and the Bankruptcy Code

The intervenors argue that if the reason Fibreboard is a limited fund is because it will become insolvent before it pays all claims, then the Global Settlement Agreement is an impermissible attempt to circumvent bankruptcy proceedings and bankruptcy's absolute priority rule.[13] This argument fails to consider (1) decisions of other courts which have certified 23(b)(1)(B) classes because the claims of the class would bankrupt the defendant, (2) the significance of Fibreboard's

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[13]The absolute priority rule requires that more senior creditors (such as tort creditors) be paid in full before junior claimants (such as shareholders) receive any distribution from an insolvent company.

settlement with its insurers in driving the Global Settlement Agreement, (3) the plain meaning of Rule 23, and (4) the nonexclusivity of the Bankruptcy Code and its inferiority to a 23(b)(1)(B) class action in the instant case.

Other courts have uniformly found that, in appropriate and limited circumstances, potential or probable insolvency of a defendant can create a limited fund appropriate for adjudication under Rule 23(b)(1)(B). The Second Circuit, in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, upheld the district court's conclusion that the likely insolvency of the Manville Trust rendered it a limited fund and qualified it for treatment under Rule 23(b)(1)(B). 982 F.2d 721, 739 (2d Cir.1992) (cited with approval in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 78 F.3d 764, 777-79 (2d Cir.1996)). In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir.1992), the Second Circuit approved a 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets. *Id.* at 292. See also, *In re Joint Eastern and Southern District Asbestos Litigation (Eagle-Picher Industries)*, 134 F.R.D. 32, 34 (E. & S.D.N.Y.1990); *Coburn v. 4-R Corporation*, 77 F.R.D. 43 (E.D.Ky.1977).

In fact, even courts that have refused to certify 23(b)(1)(B) classes have done so on the ground that the parties seeking class certification have failed to present sufficient evidence that the assets of the defendant are insufficient to pay the claims against it. See *In re Temple*, 851 F.2d 1269, 1272 (11th Cir.1988); *In re School Asbestos Litigation*, 789 F.2d 996, 999 (3d Cir.1986); *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305-06 (6th Cir.1984); *In re Northern District of California Dalkon Shield IUD Products*

Liability Litigation, 693 F.2d 847, 852 (9th Cir.1982); *Green v. Occidental Petroleum Co.*, 541 F.2d 1335, 1340 n. 9 (9th Cir.1976); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y.1983); *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 (D.Mass.1979).

In support of their claim that *any* 23(b)(1)(B) limited-fund action based on a defendant's insolvency is an improper circumvention of the Bankruptcy Code, the intervenors can rely only on dicta from *In re Joint Eastern and Southern District Asbestos Litigation (Keene)*, 14 F.3d 726 (2d Cir.1993).[14] The intervenors' conclusion is contrary to the overwhelming majority of court decisions on this issue, ignores crucial facts in both *Ahearn* and *Keene* and reads *Keene* in a way that creates an intra-circuit split in the Second Circuit.

Ahearn's Global Settlement Agreement was undisputedly driven by insurance coverage litigation between Fibreboard and its insurers which created a serious risk for all parties to the agreement. The Global Health Claimant Class and Fibreboard faced the real possibility that Fibreboard would be insolvent simply on the basis of claims already settled. The Insurers, on the other hand, faced the possibility of virtually unlimited liability for damage caused by Fibreboard asbestos. This pressure, felt by all parties to the global settlement, is what finally brought them together on the eve of the coverage case appeal. The unique risks posed by the coverage cases

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[14]Notwithstanding the *Keene* court's gratuitous discussion of its concerns about use of a class action to circumvent bankruptcy laws, the court's *holding* is that the case was properly dismissed because the plaintiff-manufacturer had no cognizable claim against the defendant class member. *Keene*, 14 F.3d at 733.

distinguish *Ahearn* from a blatant attempt to circumvent the Bankruptcy Code such as occurred in *Keene*.

The facts of *Keene* further distinguish it from our case. First, an already weak Keene attempted to avoid impending bankruptcy by asking the court to coerce its tort victims to settle claims in a court where no claims were filed against Keene. Second, Keene attempted to utilize the 23(b)(1)(B) injunction to halt pending actions in other courts. Third, and most importantly, Keene's complaint was dismissed on the ground that it failed to present the court with any case or controversy because it requested only that the court compel all plaintiffs in suits against Keene to appear and negotiate.

Ahearn by comparison, presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims. *Ahearn* presents no danger that Fibreboard may simply be abusing this proceeding to delay other actions or to improve its negotiating position with present claimants because it only enjoins future proceedings, not those already pending. We agree with the *Keene* court that under the facts presented to it, a 23(b)(1)(B) action was not appropriate. We also agree that, in the vast majority of cases, the Bankruptcy Code should govern the distribution of an insolvent entity's assets. However, where concerns such as the risk of an adverse judgment in the coverage litigation support an early resolution of the claims against an entity and all parties can benefit from a settlement under Rule 23(b)(1)(B), we see no legal or policy reason to deny the parties this benefit. The essential basis of any settlement is to avoid the uncertainty, risks, and expense of ongoing litigation. In our case, the risks facing Fibreboard, the Insurers, and the health claimants as a result of the California coverage litigation were real and enormous. Holding that the bankruptcy laws require the parties to wait until catastrophe

befalls one or more of them as a result of the California litigation would be a denial of justice to the parties before us and unwarranted by the law.

The intervenors' argument that all 23(b)(1)(B) limited-fund actions based on the insolvency of the defendant are improper ignores the special circumstances presented by Ahearn and certifications by other courts. In light of the *Findley* and *Drexel* decisions, also from the Second Circuit, which allow 23(b)(1)(B) actions where the defendant's insolvency creates a limited fund, we decline to read *Keene* so broadly as to bar all such 23(b)(1)(B) settlements.

The plain meaning of Rule 23 also supports a finding that the insolvency of a defendant can support a 23(b)(1)(B) class action. The rule clearly does not distinguish between limited funds which assume insolvency of the defendant and limited funds such as proceeds of an insurance policy which constitute the entire fund from which plaintiffs may recover. It allows class actions whenever "the prosecution of separate actions by or against individual members of the class would create a risk of ... (B) adjudications with respect to individual members of the class which would as a practical matter ... substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1). Insolvency of the defendant undoubtedly impairs the ability of latecomers to receive full payment for their claims and was explicitly considered by the Advisory Committee in proposing the rule in its current form. In its Note to the 1966 Amendment to Rule 23, the Advisory Committee concludes that a limited-fund class action is appropriate in actions by creditors "when the debtor's assets are insufficient to pay all creditors' claims." Fed.R.Civ.P. advisory committee's note. This explicit reference to use of a 23(b)(1)(B) action when the debtor is insolvent offers further support for the

proposition that insolvency is an appropriate basis for a limited-fund class action.

Further, the express language of the Rule compels a flexible construction. Rule 23(b)(1)(B) authorizes class certification where there is a "risk" that separate adjudications "as a practical matter" would "substantially impair or impede" the interests of the class. The rule does not require proof to a certainty that the defendant faces insolvency.

The Bankruptcy Code allows courts to dismiss or suspend bankruptcy proceedings where superior alternatives to the code are available. See 11 U.S.C.§305(a)(1). This concession to the possibility of other proceedings to distribute an insolvent debtor's assets reveals that Congress understood that, at least some of the time, the terms and principles of the Bankruptcy Code would be circumvented by debtors and creditors who found superior methods of asset distribution. *See also* H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6281.

Ahearn presented the district court with a superior alternative to the Bankruptcy Code and did so long before any bankruptcy court would have had jurisdiction over Fibreboard's assets. Indeed, one of the most important facts of this case is that, in spite of the threat posed by future personal injury litigation, Fibreboard is currently solvent and healthy. In the short term, no trade or tort creditor has the ability or the incentive to force Fibreboard into a Chapter 11 reorganization. It is also clear that shareholders and management, who stand to lose equity and/or employment if Fibreboard enters bankruptcy proceedings, will refuse to file a voluntary petition at least until

the coverage dispute is resolved against it. That, of course, would be too late for the Global Health Claimant Class.

Even in the unlikely event that Fibreboard could be persuaded to file a voluntary bankruptcy petition, the Global Health Claimant Class would be worse off than it is under the Global Settlement Agreement. Under the Bankruptcy Code, representation for the class may not be available at all and courts that have allowed representation of future tort claimants have left them in an uncertain position that falls short of full "creditor" status.[15] Additionally, full-blown bankruptcy proceedings would bring in all of Fibreboard's other creditors and impose large transactions costs on Fibreboard that, ultimately, would come out of any distribution. See Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J.Fin. 1067, 1077 (1984). In stark contrast to the uncertain and weak position afforded future tort claimants under the Bankruptcy Code, the plaintiff class and its representatives in *Ahearn* had center stage and ran no risk of encountering a cram-down reorganization approved only by trade creditors and rammed through over the objections of class representatives.

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[15] *See In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir.1985); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr.S.D.N.Y.1984); *In re UNR Indus.*, 29 B.R. 741, 745 n. 4 (Bankr.N.D.Ill.1983). The inability or refusal of the bankruptcy courts to place Global Health Claimant Class members on equal footing with other creditors of Fibreboard and the indeterminance of the "party in interest" categorization that the class would receive if its claims were cognizable at all in bankruptcy have been widely criticized. *See e.g.* Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand.L.Rev. 1369, 1395-96 (October 1985); Kevin H. Hudson, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 Emory L.J. 665, 693-95 (Spring 1991).

To the extent intervenors are arguing that certification is improper because Fibreboard fares better under the class action settlement than under a bankruptcy proceeding, we find their focus misplaced. The inquiry instead should be whether the class is better served by avoiding impairment of their interests. Fibreboard is clearly acting in its own interest in consummating the Global Settlement Agreement and thereby avoiding future insolvency. But the Global Settlement Agreement also serves the interests of the Global Health Claimant Class. Early settlement allows the class to recover far more as a group than it could if it was forced to wait until Fibreboard enters bankruptcy on its own and encounters the high transaction costs of insolvency. *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum.L.Rev. 846, 851-64, 905-17 (1984) (advocating early reorganizations because they avoid the waste of insolvency and distribute more to victims, but noting that no one with the ability to push the mass tortfeasor into an early reorganization has the incentive to do so). Precisely because it avoids the enormous transactions costs of litigation and insolvency, the Global Settlement Agreement can offer a deal from which all parties gain. Members of the Global Health Claimant Class receive more money in payment for their injuries and Fibreboard's shareholders keep their stake in a viable entity. The only loser under the Global Settlement Agreement is the asbestos litigation industry.

For all of these reasons, we find that the district court's decision to certify *Ahearn* as a 23(b)(1)(B) class action is an appropriate interpretation of Rule 23 that does not conflict with the Bankruptcy Code and upholds the principles of equity and fairness.

2. Jurisdictional and due process considerations in 23(b)(1)(b) class actions

The intervenors next argue that the district court cannot exercise jurisdiction over class members who do not have minimum contacts with the Eastern District of Texas and that due process requires that Global Health Claimant Class members be allowed to opt out of the class. Both of these arguments are based on language from the Supreme Court decision *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts*, the Supreme Court held that a Kansas state court could bind absent plaintiff members of the class in a "common question" class action brought under a state rule virtually identical to 23(b)(3) only if the plaintiffs were provided with "minimal procedural due process protection," including the right to opt out. *Id.* at 811-12, 105 S.Ct. at 2974. However, the Court specifically limited its holding to class actions which seek to bind

> *known* plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions such as those seeking equitable relief.

Id. at 811 n. 3, 105 S.Ct. at 2974 n. 3 (emphasis added).

The limitation of *Shutts* to claims of known plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs. See Newberg & Conte, 1 *Newberg on Class Actions* §1.18. Class actions date back to the English common law where chancery courts used bills of peace to bind entire classes. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv.L.Rev. 1297 (1932). The traditional limited-fund class action is an equitable and unitary disposition of a fund too small to satisfy all claims. *See* Fed.R.Civ.P. 23 advisory committee's note. Unitary adjudication of a limited fund is crucial because allowing plaintiffs to sue individually

would make the litigation "an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D.Ky.1977). Limited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages that claimants can ultimately receive. *In re Joint Eastern & Southern Dist. Asbestos Litigation (Findley)*, 78 F.3d 764, 776-77 (2d Cir.1996); Newberg and Conte, 1 *Newberg on Class Actions* §1.18.

Due process standards for suits seeking equitable relief are set forth in *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) where the Supreme Court stated:

> this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Id. at 42, 61 S.Ct. at 118. *See also Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73 (citing *Hansberry* in its description of due process requirements for traditional class actions). The rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by Shutts. Subsequent decisions have made it clear that, consistent with due process, absent parties can be bound by a judgment where they were adequately represented in a prior action. *Martin v. Wilks*, 490 U.S. 755, 762 n. 2, 109 S.Ct. 2180, 2184 n. 2, 104 L.Ed.2d 835 (citing *Hansberry* and Fed.R.Civ.P. 23). Actions under Rule 23(b)(1)(B) are precisely

the type of limited circumstances noted by *Martin* where "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected." Newberg and Conte, 1 *Newberg on Class Actions* §1.22 at 1-51. As a result, due process requires only that all parties bound by the Global Settlement Agreement were adequately represented. We have already concluded that they were.[16] The intervenors object that some members of the class may not have minimum contacts with the Eastern District of Texas and have not otherwise consented to the district court's jurisdiction. They also claim that the Global Settlement Agreement is without authority to release future claims that have not yet accrued. These objections again ignore the equitable nature of this action.

Due process requires adequate representation in a 23(b)(1)(B) case but, as Shutts expressly cautioned, minimum contacts or consent to jurisdiction are not necessary in equitable class actions. Newberg and Conte, 1 *Newberg on Class Actions* ,§1.20 ("Minimum Contacts Jurisdiction Not Required for Members of Equitable Class Suits") and§1.21 ("Opt-Out Rights or Implied Consent of Members Not Required for Jurisdictional Due Process in Equitable Class Suits"). It is also well settled that a unitary adjudication of a limited fund binds future, contingent, and unknown claimants who, by definition, could

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[16]Opt-out class actions were unheard of before the 1966 amendments to the Federal Rules of Civil Procedure created the Rule 23(b)(3) opt-out class action. The intervenors would have us read *Shutts* to mean that all class actions involving money claims under Rule 23(b)(1) or (2) are unconstitutional. If the Supreme Court had intended to so hold, it surely would have been more explicit given the ancient history of the mandatory class action, over a hundred years of precedent upholding the constitutionality of such classes, the relatively recent development of the "opt-out" class action, and the strong presumption that the Federal Rules of Civil Procedure are constitutional.

not give consent to jurisdiction. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Rule 23(b)(1)(B) actions closely resemble actions for interpleader, or for the accounting of a trustee. *See Mullane*, 339 U.S. at 311-13, 70 S.Ct. at 655- 57; *In re Joint Eastern and Southern Dist. Asbestos Litigation (Findley)*, 878 F.Supp. 473, 478, 562 (E. & S.D.N.Y.1995); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y.1990). *Cf. In re Federal Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir.1982). This is because all claimants will recover from the fund or not at all. This view of a limited-fund class action as similar to an action in rem makes particular sense because, although limited-fund actions often involve unknown or unavailable claimants who cannot expressly consent to jurisdiction, the court in such an action has before it for disposition all the assets in which class members could claim an interest. See e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir.1992); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y.1990); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D.Ky.1977). The court can appropriately adjudicate all claims against the fund because of its jurisdiction over the fund and the fact that all potential claimants are adequately represented before it. *Smith v. Swormstedt*, 57 U.S. (16 Howard) 288, 302, 14 L.Ed. 942 (1853).

Finally, the intervenors complain that the Global Settlement Agreement purports to release claims which do not present "a case or controversy." This misconstrues the nature of the settlement which does not purport to make any determination of the validity or amount of individual personal injury claims against Fibreboard. What the settlement does is

address the immediate and important controversy of whether future claimants will be able to receive compensation for their injuries before Fibreboard runs out of money. It resolves this controversy by settling the insurance coverage litigation, capping the amount recovered by individual plaintiffs at $500,000, prohibiting punitive damage awards, and limiting the amount that the Global Trust can pay out in any given year. These provisions are designed to ensure that latecomers do not find their claims impaired because the winners of the race to the courthouse have claimed all of Fibreboard's assets in the early rounds of individual litigation. The argument that plaintiffs who have already been exposed to asbestos have no justiciable interest in ensuring that funds remain available to compensate them when they contract asbestos-related diseases is not supportable and has been widely rejected. *See In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr.S.D.N.Y.1984); *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 196 n. 4 (3d Cir.1993). The intervenors' objection is meritless.

The district court properly found that Fibreboard is a limited fund which will be depleted to the detriment of latecomers if claims are litigated on an individual basis. Due process requires that class members in Ahearn, an equitable class action for a pro-rata distribution of a limited fund, receive adequate representation by class representatives with similar interests. The district court did not abuse its discretion in finding that these requirements were met and certifying this suit as a Rule 23(b)(1)(B) class action.

C. Other Objections

1. "Friendly" suit

The intervenors assert that *Ahearn* was a collusive or "friendly" suit in contravention of the "case or controversy" requirement of Article III in the Constitution. Specifically, the intervenors allege that (1) there was no real conflict between the parties because the complaint and settlement were filed the same day and class representatives never intended to litigate the claims alleged in the complaint, and (2) the defendants handpicked the plaintiffs' attorneys. These arguments fail because they conflict with relevant caselaw and do not address the district court's findings of fact regarding the non- collusive nature of the settlement negotiations. The intervenors also ignore the adversarial positions which the parties occupied before settlement negotiations and the positions to which they will return if the settlement is not approved.

A "case or controversy" under Article III requires that the parties be truly adverse. *United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). This requires a continuing controversy, *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975), and an "honest and actual antagonistic assertion of rights." *Johnson*, 319 U.S. at 305, 63 S.Ct. at 1076 (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892)).

The parties in *Ahearn* filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint so they clearly did not intend to litigate the complaint. However, this does not change the adversarial nature of the disputes which the settlement resolves and does not contradict the district court's finding that settlement negotiations were heated, difficult and conducted at arm's length. The intervenors are apparently asking us to hold that the suit is either moot or collusive simply because it was filed at the same time as a

settlement requiring court approval. Neither of these conclusions is supportable.

The Supreme Court has stated that the existence of a proposed settlement does not render an action moot where judicial approval of the settlement is required before the settlement will bind the parties. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 n. 10, 102 S.Ct. 1114, 1120 n. 10, 71 L.Ed.2d 214 (1982). *Ahearn* was a class action that could not be settled without court approval so the parties' agreement to settle the case did not make it moot.

The other finding suggested by the intervenors, that the suit is collusive simply because the parties have resolved their differences and seek only the judicial approval required by Rule 23(e), is equally unsupportable and has also been rejected. See *Carlough v. Amchem Products*, 10 F.3d 189, 201 (3d Cir.1993) (adopting the reasoning of the district court's October 6, 1993 opinion in *Carlough v. Amchem Products, Inc.*, 834 F.Supp. 1437, 1465 (E.D.Penn.1993)); *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 982 F.2d 721, 728 (2d Cir.1992) (complaint and settlement filed the same day); *S.E.C. v. Randolph*, 736 F.2d 525 (9th Cir.1984) (controversy exists even though settlement and complaint were filed the same day).

The district court found that the *Ahearn* complaint and proposed settlement were not collusive. The intervenors' assertions to the contrary have no support in the record. The district court found that the negotiation process was slow, contentious and fraught with disagreements on serious issues. Its exhaustive findings of fact detail the parties' initial positions and their slow movement toward a settlement that offers a fair compromise of their various claims.

The complaint that Fibreboard handpicked the plaintiffs' attorneys is equally without merit and tells only part of the story. The record shows that Fibreboard did approach the attorneys to negotiate a global settlement but the intervenors fail to include important details such as (1) the plaintiffs' lawyers involved in the negotiations have extensive experience in asbestos litigation, and (2) the district court found that the plaintiffs' lawyers vigorously represented their clients' position. We have already concluded that the Global Health Claimant Class was adequately represented by qualified attorneys. The fact that Fibreboard initiated negotiations with a group of highly experienced, top-notch plaintiffs' attorneys in order to craft a global settlement suggests that Fibreboard wanted a fair settlement that a court was likely to approve.

2. Recusal of Judge Parker

The Flanagan intervenors appeal from Judge Steger's order in the district court denying their motion to recuse Judge Parker. They argue that Judge Parker should not have mediated the settlement and then conducted a fairness hearing on the same settlement. We review Judge Steger's decision for abuse of discretion. *In re Hipp*, 5 F.3d 109, 116 (5th Cir.1993).

A judge must disqualify himself under §455 if his impartiality "might reasonably be questioned." 28 U.S.C. §455. The standard for determining impartiality depends on the source of the judge's alleged prejudice. To the extent that a judge has become biased due to facts he has learned during a judicial proceeding, he must recuse himself only if fair judgment would be impossible. *Liteky v. United States*, 510 U.S. 540, ----, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). If the alleged partiality stems from a source other than a judicial proceeding, a judge must recuse himself if "a reasonable and objective

person, knowing all of the facts, would harbor doubts concerning the judge's partiality." *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir.1995).

Judge Parker's role in the negotiating process was insubstantial and stemmed from three cases filed in his court. His actions were limited to appointing Judge Patrick E. Higginbotham of this court as a settlement facilitator, appointing class counsel for the Global Health Claimant Class at the recommendation of Judge Higginbotham, receiving regular reports of the negotiations and mediating the global settlement negotiations personally for part of one evening. After the parties agreed to a settlement, Judge Parker held an extensive fairness hearing and appointed an independent guardian ad litem to report on the fairness of the settlement to the futures class.

Judge Steger found that "[o]n the basis of the entire record and taking all of Mr. Jaques' allegations as true, ... no reasonable person would conclude that Judge Parker is biased and no reasonable person would harbor doubts about his impartiality."[17] Our review of the record confirms that Judge Parker carefully avoided any appearance of impropriety. The

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[17]The district court also rejected the intervenors' motion under 28 U.S.C. §144. This statute requires that a party submit an affidavit alleging facts that, if true, would convince a reasonable person that bias exists. However, "[a] court may not grant relief under §144 if a party's counsel instead of the party executes an affidavit alleging personal bias or prejudice." *Pomeroy v. Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 658-59 (5th Cir.1985) (citations omitted). The only affidavit before the district court was submitted by counsel for the Flanagan intervenors, Leonard Jacques, and therefore did not qualify for relief under §144. The district court's error in considering the recusal motion under §144 was harmless in any event because the court properly concluded that even if the facts in the affidavit were assumed true, a reasonable person would find that no bias exists.

district court did not abuse its discretion in denying the motion to recuse.

3. Plant Insulation Company

Plant Insulation Company, a member of the Global Third-Party Claimant Class, argues that its due process rights were violated because it was not allowed to opt out of that class. Plant did not attempt to intervene in the proceeding before the district court so it has no standing to appeal the district court's ruling. The Fifth Circuit has held that "non-named class members do not have standing to appeal the final judgment in a class action...." *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir.1988). As a result, "we have no jurisdiction to consider an appeal by a class member who has not attempted to intervene as a named party." *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir.1993). *See also, Edwards v. City of Houston*, 78 F.3d 983 (5th Cir.1996) (en banc) (unions had no standing to appeal the court's final judgment because they never became named parties or intervenors in the suit). Accordingly we dismiss Plant's appeal for lack of standing.[18]

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[18]Two other would-be appellants also lack standing under this rule. However, we need not dismiss their appeals for lack of standing because they are dismissed on other grounds. On March 25, 1996, Jeffrey Mack Chapin filed notices of appeal complaining of orders entered in *Ahearn* and *Rudd*. These notices of appeal which were consolidated into *Ahearn* and *Rudd* were untimely and are therefore dismissed. Kenneth Smith has also filed notices of appeal complaining of the orders in *Ahearn* and *Rudd*. Smith's notices of appeal have also been consolidated into *Ahearn* and *Rudd* and are dismissed due to Smith's failure to pay the docketing fee and failure to file an appellate brief.

4. Other objections of the Flanagan intervenors

The Flanagan intervenors raise several more objections common to *Ahearn* and *Rudd*. They argue that merchant mariners are differently situated from other members of the Global Health Claimant Class because of differences between admiralty law and the tort law of some states. This argument ignores the fact that the Global Settlement Agreement allows claimants the same rights they would receive in the tort system (limiting only the amount of total damages and punitive damages). Admiralty law will provide the backdrop for any maritime plaintiff's settlement because that law will govern the trials of maritime plaintiffs who choose the back-end opt-out provision.

Finally, the Flanagan intervenors claim that the district court improperly used defendant classes. They argue that defendant classes are only appropriate in cases where defendants are guilty of egregious misconduct. This argument has no support in the language of Rule 23 and is contrary to a wide range of cases where courts have certified defendant classes without requiring a "widespread pattern of wrongful conduct." *See e.g., Blake v. Arnett*, 663 F.2d 906, 911-13 (9th Cir.1981) (defendant class of Yurok Indians on counterclaims seeking declaration eliminating alleged Indian treaty rights in land held by lumber and mining company); *Board of Regents of University of Nebraska v. Dawes*, 522 F.2d 380, 381 (8th Cir.1975) *cert. denied*, 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976) (defendant class of employees allegedly discriminated against by plaintiffs); *Garneau v. City of Seattle*, 897 F.Supp. 1318, 1320 (W.D.Wa.1995) (defendant class of low-income tenants seeking relocation assistance from plaintiffs); *Houston Chapter of the Int'l Ass'n of Black Professional Firefighters v. Houston*, 1991 WL 340296, at * 3,

*28 (S.D.Tex. May 3, 1991) (defendant class of present and future non-black, non-Hispanic firefighters who will be eligible for certain ranks in the Houston Fire Department).[19]

III. RUDD

In addition to the claims addressed above, the Flanagan intervenors make several objections specific only to *Rudd*.[20]

A. Fibreboard as an Indispensable Party

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[19]The Flanagan intervenors also argue that claims which Fibreboard already knew about (those of Mr. Jaques' clients) cannot be "future claims" simply because they were not filed before the settlement was reached. This objection is asserted without any basis in law and fails to explain how claims which have not yet been filed could be anything other than "future claims" in the eyes of a court.

The Flanagan intervenors also claim that they are appealing the judgment entered in *Ahearn* which approves the Trilateral Settlement Agreement as a fair settlement of the coverage litigation between Fibreboard and the Insurers. However, Flanagan failed to raise this issue in his initial brief and has not demonstrated that he has standing to challenge this judgment. On appeal, this court will not reach issues not raised in the initial brief. *United Paperworkers Intern. U. v. Champion Intern.*, 908 F.2d 1252, 1255 (5th Cir.1990). Additionally, Flanagan has failed to demonstrate (or make any argument) that he is a proper party to appeal the judgment approving the fairness of the settlement of the coverage litigation between Fibreboard and the Insurers. *See Rohm & Hass Tex. v. Ortiz Bros. Insulation*, 32 F.3d 205 (5th Cir.1994).

[20]The Flanagan intervenors argue that *Rudd* was inappropriately certified as a 23(b)(1)(B) class. We do not consider the merits of this argument because the district court found, and we agree, that the defendant class in *Rudd* could also be certified under 23(b)(2). None of the intervenors appeals the propriety of certification under this provision.

The Flanagan intervenors argue that the *Rudd* action must be dismissed for lack of an indispensable party, Fibreboard.[21] Although they failed to raise this issue in the district court, we may still consider it on appeal. *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 482 (5th Cir.1982). However, "failure to raise the issue of joinder until this appeal mitigates against a finding in their favor." *Id.* at 483. We agree with the Ninth Circuit that "when the judgment appealed from does not in a practical sense prejudicially affect the interests of the absent parties, and those who are parties have failed to object to non-joinder in the trial court, the reviewing court will not dismiss an otherwise valid judgment." *Sierra Club v. Hathaway*, 579 F.2d 1162, 1166 (9th Cir.1978), *cited with approval in McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir.1980). *See also Judwin Properties Inc. v. United States Fire Insurance Co.*, 973 F.2d 432, 434 (5th Cir.1992) and *Sabine Shell*, 674 F.2d at 483.

Both the Trilateral Health Claimant Class and the Trilateral Third- Party Claimant Class agreed to a consent judgment sought by the Insurers declaring approval of the Trilateral Settlement Agreement and the release of the Insurers.

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[21]Rule 19(b) requires a district court deciding the question of indispensability to consider:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> Fed.Rule Civ.Proc. 19(b).

Because Fibreboard has already consented to entry of a similar release of the Insurers in *Ahearn*, the *Rudd* judgment does not prejudicially affect Fibreboard. Thus, *Rudd* should not be dismissed for want of an indispensable party.

B. Justiciability of the *Rudd* Claim

The Flanagan intervenors argue that the Rudd complaint fails to state a cause of action or a "case or controversy." The Insurers in *Rudd* seek declaratory and injunctive relief determining that (1) the Trilateral Settlement Agreement is fair, reasonable, and negotiated at arm's length in good faith; (2) the defendant classes approve of the Trilateral Settlement Agreement and the release of the Insurers; and (3) the defendant classes be enjoined from asserting future claims against the Insurers.

The Declaratory Judgment Act does not expand the jurisdiction of the federal courts. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 878-79, 94 L.Ed. 1194 (1950). Similarly, it does not create substantive rights; it is only a procedural device that enhances the remedies available in the adjudication of a case or controversy. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937).

A justiciable case or controversy exists as long as the court's ruling will affect "tangible legal rights." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 619, 109 S.Ct. 2037, 2046-47, 104 L.Ed.2d 696 (1989). In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), the Supreme Court stated that "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties

having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. at 273, 61 S.Ct. at 512.

In *Rudd*, the Insurers seek a declaratory judgment that because the Trilateral Settlement Agreement is fair and negotiated in good faith, it cuts off all rights of both Trilateral Health Claimants and Trilateral Third-party Claimants to payments under the policies. The Insurers were justifiably concerned that after they spend $2 billion on the Trilateral Settlement with Fibreboard, the settlement could be challenged by asbestos victims and third-party claimants, particularly if Fibreboard becomes insolvent. The Insurers in *Rudd* sought to cut off this potential challenge by obtaining the declaratory and injunctive relief described above.

Many states recognize that a tort victim injured during the policy period has sufficient legal interest in that policy to attack subsequent changes that affect the right to recover--i.e., reformation, cancellation, or settlement of the policy. *See, e.g., Maryland Casualty Co.*, 312 U.S. at 273-74, 61 S.Ct. at 512-13 (a tort victim has a potential financial interest in the insurer's insurance policy, and the impairment of this interest is an injury that will support standing under Article III); *Bankers Trust Co. v. Old Republic Insurance Co*, 959 F.2d 677, 682 (7th Cir.1992) ("the victim of an insured's tort, even though he is not a third-party beneficiary of his insurer's insurance policy, has a legally protected interest in that policy before he has reduced his tort claim to judgment"). Some states even require the injured party to be included in any negotiations of policy changes that will affect their rights. *See e.g., Smith & Wesson v. Birmingham Fire Ins. Co.*, 123 A.D.2d 135, 510 N.Y.S.2d 606, 608 (1st

Dept.1987); *Maryland Cas. Co. v. Wilson*, 6 Ariz.App. 470, 433 P.2d 650, 652 (1967); *Shapiro v. Republic Indem. Co.*, 52 Cal.2d 437, 341 P.2d 289, 290 (1959); *Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 236 (1956). Thus, the Insurers faced a substantial threat of collateral attacks from members of both the Trilateral Health Claimant Class and the Trilateral Third-party Claimant Class asserting that the Trilateral Settlement was unfair or fraudulent. A true controversy existed.

The Flanagan intervenors also argue that the Trilateral Settlement Agreement is effective only if the *Ahearn* settlement is rejected. Flanagan argues that this contingency precludes a finding that *Rudd* is an adjudication of a "present right upon established facts." *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir.1967).

The Trilateral Settlement Agreement contains provisions that become operative regardless of whether the Global Settlement Agreement is ultimately approved or disapproved; for example, the parties agree in the Trilateral Settlement Agreement to compromise all Fibreboard's claims under the insurance policies not previously released, including claims for property damages. The Global Settlement Agreement only refers to personal injury claims filed against Fibreboard after August 27, 1993. Therefore, the effectiveness of the Trilateral Settlement Agreement is not wholly contingent on the outcome in *Ahearn*.

Moreover, the case would be ripe even if the effectiveness of the Trilateral Settlement Agreement were wholly contingent upon the disapproval of the Global Settlement Agreement. In *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138 (5th Cir.1993), we found a case would be ripe for adjudication notwithstanding the existence of some contingency

to the claim if either (1) there is "a substantial possibility" that the contingency will occur, or (2) the only questions being presented "are purely legal ones." *Id.* at 1154. We found judicial resolution of contingent claims is consistent with the purpose of the Declaratory Judgment Act which is "to settle actual controversies before they ripen into violations of law or breach of some contractual duty." *Id.* (quoting Hardware *Mutual Casualty Co. v. Schantz*, 178 F.2d 779, 780 (5th Cir.1949)).

In *Rudd*, the contingency that the global settlement might not receive court approval or might be successfully attacked was a substantial possibility; the global settlement was an innovative approach to unique circumstances. The parties to *Ahearn* had no assurance that a court would accept this settlement which is the reason the *Ahearn* plaintiffs insisted on a back-up agreement to settle the coverage issue. Thus, we agree with the district court that the *Rudd* complaint presented a justiciable claim.

CONCLUSION

Although appellants' arguments challenging the approval of the global settlement are not insubstantial, on the unique facts presented here they do not carry the day. The global settlement was driven by insurance coverage litigation between Fibreboard and the Insurers which would have been catastrophic for whomever was on the losing side. None of the parties was prepared to take the enormous risk inherent in that litigation. The global settlement offers all sides the best solution possible by eliminating costly disputes between Fibreboard, its insurers, and asbestos claimants and ensuring an equitable distribution to asbestos claimants. The $1.5 billion global settlement was a major accomplishment by all parties concerned and no one

seriously challenges its adequacy or the desirability of avoiding another bankruptcy of a vigorous American company.

For the reasons stated above, we conclude that in this case none of the legal impediments argued by appellants precluded the district court from approving the global or trilateral settlements. Both settlements were legally sound resolutions of serious disagreements. The judgment of the district court is AFFIRMED.

APPENDIX B

JERRY E. SMITH, Circuit Judge, dissenting:

I. Introduction.

The district court and the majority undoubtedly are driven by a commendable desire to resolve voluminous personal injury claims against an otherwise strong American company and to ensure an orderly transfer of funds from the company's insurers to its victims. In order to accomplish this result, however, they have extinguished claims over which they have no jurisdiction and deprived thousands of asbestos victims of basic constitutional rights. The result is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved.

Ironically, the willingness to jettison centuries-old legal precepts hurts the very victims they intend to help: The settlement forces asbestos victims to surrender their claims in exchange for a meager $10 million of Fibreboard's $225-250 million net worth. They also benefit from Fibreboard's settlement with its insurers, but Fibreboard and the insurers had powerful incentives to settle that dispute by themselves; in fact, they did so for $2 billion.

There was no need even to involve the class in those negotiations, much less to sacrifice its interests. "Thus, the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right."[1]

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[1] John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM.L.REV. 1343, 1420 (1995).

On the other hand, the district court and the majority have bailed Fibreboard's shareholders out of a mammoth liability and awarded $43.7 million to class counsel. This suit was supposedly brought on behalf of Fibreboard's victims, but of the four entities directly affected by the settlement-- Fibreboard, class attorneys, courts, and asbestos victims--the victims were the only entity absent from the bargaining table. Perhaps for that reason, they also were the only losers.

How could well-intentioned judges sanction--indeed, compel--such an untoward result? Apparently this is simply a case of judges--both trial and appellate--trying too hard to solve the vexing problems posed by unending asbestos litigation. Having certified at least two other high-profile asbestos class actions,[2] then-Chief District Judge Parker was acutely aware of the problems posed by asbestos litigation. In the end, he appears to have become too close to both the overall problem and the instant settlement to continue to act in a judicial capacity in this case.[3]

When Fibreboard and class counsel announced at a court hearing that they had reached a settlement, Chief Judge Parker referred to "extensive negotiations between counsel that the Court has participated in." Also at that time, and long before

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[2]See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir.1990) (granting writ of mandamus); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir.1986) (affirming certification).

[3]For example, certain of the appellants make much of a gathering Chief Judge Parker arranged at his house during which, *allegedly*, counsel-- especially the insurers'--were hounded into settling. I reach no conclusion regarding the details of this episode except that it demonstrates both that the proceedings in this case were unusual and that Chief Judge Parker was aggressively involved in the settlement.

the fairness hearing, he said, "We will trust in the scholarship, the good judgment and common sense of the ... courts of appeal in the event this comes to their attention." In short, Chief Judge Parker tried his best to solve a perplexing problem, and it is our task to figure out whether that solution is legally sustainable.

There are two primary problems: (1) Fibreboard, class counsel, and Fibreboard's other creditors have combined to profit at the expense of absent class members; and (2) this case is an affront to the integrity of the judicial system. As we observed when reversing Chief Judge Parker's certification of another class action against Fibreboard: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *Fibreboard*, 893 F.2d at 712.

A. Importance and Uniqueness.

This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Thus, the majority's reliance upon the "unique facts" of this case, see maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique

facts--a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement--likely will become far too common now that the majority has approved of them. "[W]hat was meant to provide a remedy for those who would otherwise lack one, enabling them to pool their voices and finances, will become a device to take away remedies from those who could otherwise invoke them." John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L.REV. 1222, 1223 (1995).

B. The Need for Procedural Protections.

Two primary errors led the district court and the majority astray.

These are, first, underestimating the importance of jurisdictional and procedural protections for absent class members, and second, departing from the judiciary's exclusive area of authority and competence--the resolution of lawsuits.

We must keep in mind that it was the *defendant*--Fibreboard--who selected the class that was to "sue" it and the class action lawyers who were to do the dirty work. Fibreboard hand-picked a class that was uniquely vulnerable to exploitation, class counsel who were widely reported to have sold out a similar class, and a court with a reputation for favoring a global settlement. Class counsel then cut a side deal with Fibreboard before agreeing to the class settlement, and the district judge presided at the fairness hearing on the very settlement he had helped to craft.

The settlement extinguishes claims of people over whom we lack jurisdiction, some of whom have not yet been injured

and others of whom have not even been born. It also prevents such future claimants from opting out, because of a supposed need to divide a limited fund among a large number of claimants, but it grants automatic opt-outs to all those who already had filed suit. Coincidentally or not, this gerrymandered class definition includes those most vulnerable to abuse while excluding those most likely to intervene, to monitor class counsel, and to oppose the settlement.

It is fair to question for whom class counsel really worked. Fibreboard picked them, the district court approved them, the insurers paid them, and in exchange, they bailed out Fibreboard's shareholders and relieved district courts of potentially thousands of cases--at the expense of the absent asbestos victims whom class counsel purportedly represent.

> If all that was at stake for individual class members was some nominal compensation for having been charged an extra five cents on a bag of potato chips, one might not be too concerned with how the courts enforced class counsel's duties to these people. But often much more is at stake, such as whether a plaintiff will recover for a fatal illness caused by a defective product, and if so, how much. Today, such a person may have her rights adjudicated by a court without actual notice of the action and before she even knows she has been injured.
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> Fantastic as this may seem ..., it is true.[4]

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[4]Susan P. Koniak, *Through the Looking Glass of Ethics and the*

(continued...)

But it need not be. Even rudimentary constitutional protections--such as according absent class members adequate representation and adjudicating only their presently-existing, legally cognizable injuries--would have prevented Fibreboard from perpetuating this unfortunate miscarriage of justice.

C. Legislated Tort Reform.

The district court legislated a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit. Of course, there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they already had settled it. Thus, Chief Judge Parker began his opinion by stating, "This action was filed to obtain judicial approval of a class settlement." *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 507 (E.D.Tex.1995).

The class complaint alleges exposure-only claims for which the settlement provides *no* compensation. Class counsel even conceded that, as a matter of practice, they do not pursue such claims on behalf of their own clients; instead, they wait and file suit after a plaintiff actually has suffered an injury. The *only* reason to include those claims in the complaint was to manufacture jurisdiction over class members who have not yet

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(...continued)

Wrong with Rights We Find There, 9 GEO. J. LEGAL ETHICS 1, 13 (1995). The *Ahearn* and *Georgine* settlements have received significant attention in the academic literature, most of it extremely negative. *See, e.g.*, Coffee, *supra* note 1, at 1393-1404; Roger C. Crampton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L.REV. 811, 825-35 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L.REV. 1045 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L.REV. 858, 898-900 (1995).

manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury. Even that attempt to trump up jurisdiction should fail, however, as many states do not recognize an exposure-only cause of action.

Moreover, the settlement does not resolve the rights of individual class members. The only genuinely judicial aspect of approving the settlement is the release of Fibreboard from liability to the class, or more specifically, the transfer, from Fibreboard's shareholders to its victims, of the risk that Fibreboard's insurance assets are inadequate.

The remainder of the settlement is purely legislative: Class members' causes of action are repealed in favor of the equivalent of a workers' compensation regime.[5] The Association of Trial Lawyers of America summed up this point nicely in an amicus brief opposing the settlement: "The alchemy of the [instant] settlement ... had the effect of transforming the common law damage claims of asbestos victims, which were

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[5]The purported "back-end opt-out right" likely will prove to be no right at all. Before he may even file a lawsuit, a victim must (1) file a claim with the trust and wait for it to evaluate his claim; (2) engage in settlement discussions; (3) proceed to mediation; and (4) participate in non-binding arbitration.

> Even after securing a court judgment in his favor, the claimant may not enforce that judgment; instead, he must accept installment payments over a number of years. His recovery is capped at a pre-set dollar amount, and he is barred from receiving punitive damages or pre- or post-judgment interest. In short, the settlement ensures that the trust can make trial an impracticable method of recovery, forcing class members to settle within the confines of the administrative procedure devised by Fibreboard and class counsel.

clearly safeguarded by the right to trial by jury, into administrative claims without that right." Amicus br. at 9.

Even if exchanging state tort law for this private, alternative dispute resolution mechanism were the boon to class members that the majority holds it out to be--and I doubt that it is, *see infra* part IX--such a policy decision is "better addressed to the representative branches--Congress and the State Legislature." Fibreboard, 893 F.2d at 712. In addition, *Fibreboard* hardly deserves more than $200 million for drafting the legislation.

"[T]raditional ways of proceeding reflect far more than habit." *Fibreboard*, 893 F.2d at 710. As judges are trained and equipped to adjudicate, not legislate, it is understandable that the courts have fallen prey to powerful special interest groups--a wealthy defendant and the class action bar--and unwittingly disserved the very victims the courts were intended to help.

D. Constructive Bankruptcy.

Nor does Fibreboard's "constructive bankruptcy" justify abridgment of absent class members' substantive state law rights. In bankruptcy, the claims of all of Fibreboard's creditors, not just its "future" personal injury victims, would be crammed-down. Permitting Fibreboard to effect a reorganization bankruptcy proceeding in the guise of a futures-only class action circumvents the detailed protections of the Bankruptcy Code for the express purpose of imposing the entire cost of the bailout on Fibreboard's most vulnerable creditors, to the betterment of its shareholders.

The Second Circuit decertified a similar settlement class for precisely that reason:

> Evasion of bankruptcy is ... not without costs or other perils.... [C]lass members in cases such as this would have no say in the conduct of the court- appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. For them, it would be "cram-down" from start to finish.

Keene Corp. v. Fiorelli (In re Joint E. & S. Dist. Asbestos Litig.), 14 F.3d 726, 732 (2d Cir.1993) (citation omitted). The amicus brief of the Trial Lawyers for Public Justice puts the point more forcefully: "[I]nstead of protecting class members from the risk that their ability to obtain relief from Fibreboard will be 'substantially impaired,' certification of the proposed settlement class here ensures that the class members' ability to obtain relief from Fibreboard will be totally *eliminated*." Amicus br. at 6.

E. Creating a Circuit Split.

Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here. The Ninth Circuit has squarely held that opt-out rights are available in *all* class actions seeking predominantly monetary damages, regardless of the subsection under which they were certified. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir.1992), *cert. dismissed*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). Two other circuits appear to agree with the Ninth, and none has expressly disagreed. *See infra* note 16. Without even citing that authority, however, the majority arbitrarily limits opt-out rights to actions certified under FED.R.CIV.P. 23(b)(3), *see* maj. op. at 987 n. 16, exalting an irrelevant technicality over the underlying reality and creating a circuit split in the process.

Earlier this year, the Third Circuit firmly held that class counsel cannot adequately represent both extant and latent claimants in a futures-only asbestos class action. *Georgine v. Amchem Prods.*, 83 F.3d 610, 630-31 (3d Cir.1996). The court explained that while extant claimants--those who have already incurred injuries--desire immediate, unlimited recovery from the trust, latent claimants--those who have yet to suffer an injury--desire that recovery be capped or delayed to ensure that extant claimants will not deplete the fund. *Id.*

The majority mentions *Georgine* only in a brief footnote, distinguishing it on the ground that the *Georgine* settlement provides a detailed claims resolution schedule, while the *Ahearn* settlement does not. *See* maj. op. at 976 n. 8. Class counsel still served conflicting interests, however, and postponing some distributional issues until after certification and appeal hardly makes them disappear. The majority may prefer the devil it does not know to the devil it does, but I am loath to make that decision for an entire class of people who are not even aware that we are "adjudicating" their rights.

On the other hand, the majority is correct that *Keene* is easy to distinguish, for the defendant in that action was forthright: Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement. *See Keene*, 14 F.3d at 728-29. The Second Circuit dismissed the action, finding that "it is a self-evident evasion" of the Bankruptcy Code, "the exclusive legal system established by Congress for debtors to seek relief." *Id.* at 732. Future defendants presumably will draw one of two conclusions: Involve the court as little as possible in settlement class actions, or file in the Fifth Circuit.

In sum, the settlement fails either a customary legal analysis or a common- sense smell test. I respectfully but vehemently dissent from all but part III of the majority opinion.

II. Facts and Procedural History.

Though the background to this case is somewhat complicated, the key facts are hard to overlook. Fibreboard approached four plaintiffs' lawyers, including Ron Motley and Joe Rice, and suggested that they negotiate a "global settlement" of all of Fibreboard's asbestos liabilities. The negotiations initially failed, perhaps because of the massive scope of the undertaking.

Fibreboard then adopted a risky strategy of assigning claims against its insurers in settlement of individual suits. The danger was that these settlements arguably violated the insurance policies. Fortunately for Fibreboard, a California court approved the deals.

Then something odd happened: Fibreboard settled a large number of cases with Ness Motley--Motley and Rice's law firm--by assigning insurance assets, and brought an action in the Eastern District of Texas seeking approval of the settlement. Why would Fibreboard, a California company, roll the dice in Texas when it had already won in California? Because something important had happened in Pennsylvania.

The Judicial Panel on Multidistrict Litigation had transferred all pending asbestos cases not yet on trial to a district court in Pennsylvania. *See Georgine v. Amchem Prods.*, 83 F.3d 610, 619 (3d Cir.1996). Then-Chief Judge Robert Parker of the Eastern District of Texas wrote a letter to the transferee judge, telling him that he (the Pennsylvania judge) was "the

Eisenhower of this D-Day operation" and encouraging him to prod the parties to a global settlement. *See* Coffee, *supra* note 1, at 1390.

When the plaintiffs' steering committee rejected such a proposal, twenty defendants approached a minority faction of the committee--Motley and Gene Locks--and reached a global settlement with them. *See id.* at 1391-92, 1457. Actually, they made a series of deals: a class action settlement for future asbestos victim claimants and separate settlements for the lawyers' pre- existing, individual clients.

The separate settlements were significantly more lucrative than the class one. *See id.* at 1392-93; Koniak, *Feasting, supra* note 4, at 1052. In fact, Motley received fifty percent more for his own clients than he did for those in the class. *See* Coffee, *supra* note 1, at 1397; Koniak, *Feasting, supra* note 4, at 1067. The Third Circuit rejected the settlement, finding that class counsel--including Motley--were hopelessly conflicted. *See Georgine*, 83 F.3d at 630-31.

As the *Georgine* negotiations concluded, Fibreboard and Ness Motley settled a number of cases and, as noted above, filed an action in Chief Judge Parker's court. Fibreboard thereby secured class counsel with a track record of making global settlements and a judge with a demonstrated commitment to them. Following the *Georgine* pattern, class negotiations reached an impasse over the future of Ness Motley's remaining cases against Fibreboard. The court-appointed "Settlement Facilitator," Judge Patrick Higginbotham, then suggested that they settle those cases before attempting further negotiation of a global settlement. After concluding the Ness Motley deal--which settled the individual claims for higher-than-average amounts, contingent upon successful completion of a global

settlement--Fibreboard and class counsel resumed negotiation of such a settlement.

As those negotiations drew to a close, Chief Judge Parker intervened, taking counsel to his house for a final mediation session. It appears that he was successful, for defense counsel eventually increased their offer to an amount that class counsel later accepted.

Class counsel then filed a complaint in Chief Judge Parker's court, along with motions to certify the class and approve the settlement. The judge certified the class and found that the settlement was fair. And Fibreboard's stock soared.[6]

III. The Forest for the Trees.

The majority commits two fundamental errors: first, treating justiciability, due process rights, and certification criteria as mere annoyances to be brushed aside in pursuit of what it believes to be the greater good; and second, failing to assess the aggregate effect of its restrictions on asbestos victims' due process rights.

Justiciability and certification requirements are indispensable in any class action. Justiciability looks, among other things, to whether a person has suffered a legally cognizable injury. If an individual has not been legally injured, it is unlikely that he would receive notice of the action or realize that he is a member of the class. Even if he became aware of the action's potential effect on his legal rights, he would likely remain apathetic: Any effect on him is remote in time and

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[6]*See* Coffee, *supra* note 1, at 1402 & n. 232.

contingent on the future development of a disease or other damage or injury. Thus, such class members are especially vulnerable to abuse by class counsel.

Similarly, certification criteria such as commonality, typicality, and adequacy of representation ensure that representative litigation is truly representative. If class counsel stand to gain from selling out the class or from benefiting one subgroup of claimants over another, some or all class members are deprived of a meaningful opportunity to be heard--one of the most fundamental of all due process rights.

The majority addresses each class protection device in isolation, always finding that the protection does not apply because of a legal rule developed in a different context or an historical analogy that fails to recognize the novelty of this action. Such tunnel vision obscures the fact that while a particular protection might not always be necessary, some combination of protections is. When courts remove all meaningful safeguards--as the majority does here--class members suffer dramatically.

A. The Danger Inherent in Representative Litigation.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party...." *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). This "deep-rooted historic tradition that everyone should have his own day in court," 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE (hereinafter "WRIGHT & MILLER") §4449, at 417 (1981),

creates the core of due process: the rights to notice, to control one's own case, and to an opportunity to be heard.

The class action device is an equitable exception to this bedrock principle. *See Hansberry*, 311 U.S. at 41, 61 S.Ct. at 117-18. Not surprisingly, such a "fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems." *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir.1987). More bluntly, "class actions are extraordinary proceedings with extraordinary potential for abuse." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex.1996).

Accordingly, the Constitution's guarantee of due process requires us to use this joinder device carefully: In exchange for losing the right to prosecute his own action, a class member must receive a variety of substitute protections. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985); *Hansberry*, 311 U.S. at 45, 61 S.Ct. at 119-20. Though the Supreme Court has largely refrained from determining the scope of those protections, its scant jurisprudence establishes two related principles: First, the extent to which due process requires procedural protections necessarily depends upon the extent to which class members' interests are infringed;[7] and second, we must meet new uses of the device with new protections.[8] In short, the safeguards

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[7]See *Shutts*, 472 U.S. at 808-11, 105 S.Ct. at 2972-74 (finding that opt-out right, rather than opt-in requirement, adequately protects class members in light of burdens imposed on them).

[8]*See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950) (balancing interests of class members and efficient operation of modern investment trusts). The majority's

(continued...)

required by due process necessarily differ according to the type of action, and when confronted with a new animal, we must analyze those safeguards anew. Reliance on strained analogies to inapposite traditional actions leaves us in what one commentator has aptly labeled a "due process quandary."[9] Thus the irony: The majority eviscerates well- established due process protections because of the "unique facts" of the case, *see* maj. op. at 993, but fails to recognize that those novel facts may actually call for *enhanced*, not lessened, protections for vulnerable asbestos victims.[10]

B. Vulnerability of the Class.

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[8](...continued)
assertion that "[t]he rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by Shutts," maj. op. at 986, is erroneous. The Hansberry court reserved judgment on what other procedures might be required, *see* 311 U.S. at 43-44, 61 S.Ct. at 118-19, and the Court later found that members of mandatory classes have an additional due process right to adequate notice, *see Mullane*, 339 U.S. at 318-19, 70 S.Ct. at 659-60. Nor did *Shutts* construe *Hansberry* so narrowly. *See Shutts*, 472 U.S. at 808-09 n. 1, 105 S.Ct. at 2972-73 n. 1 ("The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit such that a decree against those parties in the prior suit would bind the petitioners.").

[9]*See* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L.REV. 871, 911-12 (1995); cf. William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revisited?*, 94 MICH.L.REV. 1250, 1255 (1996) (observing that appropriate accommodation of competing interests differs according to nature of class and claims).

[10]We need not consider the outer limits of due process in this case, however, as the district court failed to employ even basic protections such as opt-out rights and adequate representation.

This case is indeed such a new animal. The district court certified a class

> (1) including people who have not yet been injured or do not yet know that they have been injured;
> (2) excluding all present claimants;
> (3) for settlement purposes only;
> (4) in a mandatory action seeking predominately monetary damages.

Certification of futures-only actions creates a massive potential for abuse. Many putative future claimants have manifested no symptoms and do not even know they were exposed. Others are the future spouses and children of asbestos victims, most of whom either do not exist or could not possibly know that they are class members. Thus, the due process standbys--notice and an opportunity to be heard--are meaningless to countless future claimants.[11]

Moreover, future claimants are, by definition, persons who have not yet developed a sufficient interest in their claims to file suit; thus, they are likely to be passive and particularly vulnerable to exploitation.[12] Finally, courts have a rotten track record with futures-only actions: Of the two largest such

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[11] *See Ivy v. Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425, 1435 (2d Cir.1993) (observing that "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good"), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994); *see generally* Marcus, *supra* note 4, at 889 (explaining that the notice given to *Ahearn* class members was particularly hard for them to understand).

[12] *See* Crampton, supra note 4, at 828.

actions, one is *Georgine*, and the other settlement fell apart because the parties radically underestimated the number of claimants. *See* Coffee, *supra* note 1, at 1417-18 (discussing failure of Dow Corning settlement).

These concerns are mitigated somewhat by the breadth of the "futures" class. Some members are presently injured and aware of their injuries, and some have even spoken with lawyers. While most of these claimants might not have retained counsel for the sole purpose of intervening, some might have, and others at least might have chosen to opt out, had that protection not been removed as well.[13] Of course, any such intervenors protect only their own interests, which differ dramatically from those of class members who are not presently injured. *See infra* part VI.A.2. Thus, futures-only classes are still highly vulnerable to abuse.

This case also presents a radical extension of the mandatory class action. The class complaint seeks, and the settlement provides, predominately monetary relief. While historically we have permitted mandatory actions when a class sought to litigate joint rights regarding a common fund, the only *common* fund in this case is the settlement proceeds. To the extent that there is a *limited* fund, it is a contrived one, created by the litigation and settlement strategies of Fibreboard and its insurers. *See infra* note 17.

The concept of a futures-only mandatory action is also self-contradictory. If we must bind victims in the class in order to protect their rights and ensure an equitable distribution, then

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[13]Two groups of plaintiffs intervened in this action. Thus, while exclusion of present claimants appears to have limited the opposition, it did not completely eliminate it.

we must bind *all* such victims, not just some. Limiting the class to future claimants grants the equivalent of an automatic opt-out to present claimants, and there is simply no principled way of distinguishing the one group from the other.[14]

Arbitrariness in the class definition might not present a problem by itself, but future claimants, unlike present claimants, are particularly vulnerable. Exclusion of all present claimants has the effect (if not the purpose) of excluding all those who are likely to receive notice, monitor the class action, and oppose the class attorneys' conflicts and other inadequacies.[15]

Finally, this is a settlement class action. Permitting such actions creates an unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); Crampton, *supra* note 4, at 826-27. Moreover, a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work *pro bono* unless they consent to a settlement.

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[14]*See* Koniak, *Feasting*, *supra* note 4, at 1058; Crampton, *supra* note 4, at 829-30.

[15]In addition, the settlement's silence regarding the actual compensation that claimants can expect--other than various caps and limitations on recovery--makes it difficult for class members and courts to evaluate the settlement. That lack of information might be one of the reasons that the intervenors chose not to attack the settlement's substantive fairness on appeal.

If nothing else, use of a mandatory settlement action with an automatic opt-out for all those likely to intervene, and no opt-out for anyone else, raises a red flag. To the best of my knowledge, no one has ever attempted to do such a thing before: Even the now-discredited *Georgine* settlement permitted opt-outs.

C. Diminished Protection for the Class.

A novel action laden with such an extreme potential for abuse certainly demands a close look, but the majority accepts the settling parties' distortion of that background reality and actually ratchets *down* the degree of protection accorded absent class members.

The *Ahearn* settlement is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth. Fibreboard and the insurers did not need class proceedings to reach the first agreement. Avoiding an all-or-nothing judgment in the California coverage litigation gave them a powerful incentive to settle, regardless of whether they could extinguish future claims at the same time. As the majority observes, "*None* of the parties was prepared to take the enormous risk inherent in that litigation." Maj. op. at 993 (emphasis added). In fact, Fibreboard and the insurers did reach such a settlement. *See* maj. op. part III (unanimously approving that agreement).

With that cloak removed, the second half of the *Ahearn* settlement is wholly baseless. The class members surrendered their claims against Fibreboard, submitted to an arbitration

procedure, and agreed to a total cap on damages, individual caps on damages, an absolute ban on punitive damages, and other restrictive provisions. In exchange, Fibreboard gave the class a mere $10 million--less than five percent of its net worth. Fibreboard sought certification based upon a constructive bankruptcy theory, but it walked away with barely a scratch. Not surprisingly, Fibreboard's stock skyrocketed when the settlement was announced. *See* Coffee, *supra* note 1, at 1402 & n. 232.

Even accepting the settling parties' mischaracterization of the settlement does little to justify certification, however, for traditional class protections still prevent it.

IV. Due Process and the Right To Opt Out.

The majority's treatment of opt-out rights is a paradigmatic example of its erroneous reasoning. Though the Court plainly held in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985), that class members have a right to opt out of actions (such as this) seeking primarily monetary relief, the majority refuses to recognize that right, on the ground that it was not historically available in traditional "common fund" litigation.

The majority's holding that *all* rule 23(b)(1) class actions are immune from *Shutts* is in direct conflict with the holding of a sister circuit.[16] Moreover, this case presents anything but a

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[16]The Ninth Circuit has held that a class action certified under rule 23(b)(1) and (b)(2) cannot bind absent plaintiffs unless they are allowed to opt out. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir.1992) (holding that absent plaintiffs were not bound by a rule 23(b)(1)-(b)(2) class action for money

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traditional common fund,[17] and the majority's attempt to

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[16](...continued)
damages, because the original class action court did not have personal jurisdiction over the plaintiffs and did not provide them with an opt-out right), *cert. dismissed as improvidently granted*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). *See also In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.) (reversing an injunction and allowing a collateral attack against a rule 23(b)(1)-(b)(2) class action to proceed in a different jurisdiction), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). In *dictum*, the Second Circuit has recognized that a rule 23(b)(1) action that aggregates claims seeking legal remedies requires an opt-out right. *In re Joint E. & S. Dist. Asbestos Litig. (Findley I)*, 982 F.2d 721, 735 (2d Cir.1992) (upholding a mandatory class action by beneficiaries of a trust but recognizing that "[i]f the members of the plaintiff class were not all beneficiaries of the Trust, we would think that the applicable standards for personal jurisdiction would be drawn more from *Shutts* than from *Hansberry* "); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir.1996) (distinguishing the class action from that in *Shutts* because the restructuring of a trust is an equitable remedy).

[17]The paradigmatic use of rule 23(b)(1)(B) is for a common (or limited) fund, which exists

> when a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated. Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, process of a ship sale in a maritime accident suit, and others.

1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS (hereinafter "NEWBERG ON CLASS ACTIONS") § 4.09, at 4-32 through 4-33 (3d ed. 1992). The language of rule 23(b)(1)(B) is broad enough to encompass more than the traditional common fund, id. at 4-31, and the fact that an action meets the requirements of rule 23(b)(1)(B) does not necessarily transform it into one for the division of a fund. This case deviates from the traditional common fund in a number of ways. First, there is no fund to speak of. The insurance proceeds are not common or limited, but are simply all that the

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analogize it to an action to settle a trust is entirely unjustified: Far from adjudicating equitable rights in a preexisting fund, the settlement *creates* a common fund by extinguishing *personal* rights of action. In short, the majority rationalizes its evisceration of a right that we have already recognized with a call to historical rigidity.

A. Basic Requirements of the Shutts Case.

Shutts could not be more unambiguous:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812, 105 S.Ct. at 2974-75 (citations and footnotes omitted). The Court, however, specifically limited its holding to claims "for money damages or similar relief at law," as opposed

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[17](...continued)
defendants are willing to provide to the settlement. A settlement offer is far from "a fixed asset ... in which all class members have a preexisting interest." The fact that Fibreboard's asbestos abilities are greater than its assets is also insufficient to create a common fund, even though it is sufficient to meet the requirements of rule (b)(1)(B). *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistage Class Actions after* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 42 (1986) (describing the "constructive bankruptcy" theory for certifying mass torts under rule (b)(1)(B)). *See also* Marcus, *supra* note 4, at 877-81 (suggesting that a common fund theory does not work for mass torts). Second, the plaintiffs do not have a preexisting interest in Fibreboard's assets; the purpose of the suit is to establish those rights and not to divide preexisting rights.

to actions seeking "equitable relief."[18] Thus, *Shutts* teaches that in an action seeking money damages, an absent plaintiff is entitled to the right to opt out.[19]

Following *Shutts*, a mandatory class action is viable in two cases: (1) where the court has jurisdiction over all the plaintiffs or (2) where the plaintiffs seek equitable relief. Unlike the majority, I believe that whether a class action seeks equitable relief or money damages can be determined only by focusing on the underlying remedy the plaintiffs seek. *See, e.g., Findley I*, 982 F.2d at 735 (affirming certification of a mandatory class action but noting that it would violate due process if the request for relief were for money damages rather than division of a trust).

If one focuses on the plaintiffs' remedy, the *Ahearn* class cannot be characterized as one "seeking equitable relief." The

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[18]472 U.S. at 811 & n. 3, 105 S.Ct. at 2973-74 & n. 3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

[19]Although *Shutts* involved a state court action, the consensus view is that it applies to federal class actions as well. *See Matsushita Elec. Indus. Co. v. Epstein*, --- U.S. ----, ----, 116 S.Ct. 873, 888, 134 L.Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In [Shutts], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation."); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 198-99 (3d Cir.1993); *Brown*, 982 F.2d at 392; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir.1992) *(dictum), cert. dismissed*, 506 U.S. 1088, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *In re Real Estate Title*, 869 F.2d at 766 n. 6. *See also* Miller & Crump, *supra* note 17, at 29-31.

complaint alleges only personal causes of action against Fibreboard for money damages.[20] The prayer for relief seeks general and special compensatory damages, punitive damages, costs of the suit, appropriate declarations and orders, and other relief as may be deemed just and proper. These remedies represent paradigmatic legal remedies.[21] 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES (hereinafter "LAW OF REMEDIES") §§ 3.1-3.2 (2d ed. 1993). The majority, maj. op. at 976, agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos."

B. The Majority's Circumvention of Shutts.

The majority circumvents *Shutts* by calling *Ahearn* an equitable action.[22] Instead of focusing on the plaintiffs' remedies, the

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[20]The specific counts in the complaint are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." The last count consists of every "claim or cause of action" that the plaintiffs can assert against Fibreboard.

[21]*See also* Marcus, *supra* note 4, at 888 ("[T]he limited fund concept should rarely, if ever, be available in mass tort litigation. Even if it can be sustained in some instances, there is no denying that the claims asserted are for compensatory damages, and there is arguably a constitutional right to opt out.").

[22]*See* maj. op. at 986 ("The limitation of *Shutts* to claims of unknown plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs."). The majority also intimates that *Shutts* does not apply to rule 23(b)(1)(B) actions because the absent plaintiffs are unknown. *See* maj. op. at 986. The unknown- plaintiff exception in *Shutts* does not apply to this case, however.

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majority characterizes the action based on which subsection of rule 23 the court invoked to certify the class. From the historical fact that rule 23(b)(1)(B) originated in courts of equity, the majority concludes that all actions certified under rule 23(b)(1)(B) are equitable and thus immune from *Shutts*.

1. Conflict with Other Circuits.

The majority's holding is in direct conflict with decisions of the Third and Ninth Circuits. *See Brown; In re Real Estate Title*. The Ninth Circuit has directly held that *Shutts* applies to rule 23(b)(1)-(b)(2) actions when the plaintiffs' underlying claims are for money damages. *Brown*, 982 F.2d at 392. The Third Circuit also has recognized that a mandatory class action does not have a *res judicata* effect on absent class members when the underlying claims are for money damages and the court did not have personal jurisdiction over the plaintiffs. *In re Real Estate Title*, 869 F.2d at 768-69. The majority fails to discuss either case.

Both cases arose out of the same antitrust class action. *See Brown*, 982 F.2d at 388-89. The original class complaint sought money damages and injunctive relief and was certified under rule 23(b)(1) & (b)(2). *In re Real Estate Title*, 869 F.2d at 760, 763. The action settled on terms favorable to the

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[22](...continued)

The court lacks personal jurisdiction over a large number of known plaintiffs who have manifested injuries but failed to file suit before the class action was filed. Moreover, a large number of the exposure-only plaintiffs are known. For example, shipyard workers who have not yet manifested any sign of disease could easily be identified and notified of the settlement. They then could decide whether to opt out. If they did, their individual and derivative wrongful death claims no longer would be part of the settlement.

defendant, and a number of absent plaintiffs were left without a settlement check.

The first case challenging the no-opt-out class action arose by way of injunction in the Third Circuit. Following settlement of the class action, a number of absent plaintiffs filed a new suit against the same defendants for the same activity. The defendants asked the district court that heard the original class action to enjoin the Arizona state court suit. *In re Real Estate*, 869 F.2d at 762. The district court granted the injunction, but the Third Circuit reversed, classifying the original class action as a hybrid suit seeking both money damages and equitable relief. *Id.* at 768-69. The court applied *Shutts* and held that the district court did not have personal jurisdiction over the absent plaintiffs in the original action and that it would violate due process for the court to enjoin a collateral attack on the class action. *Id.*

The other shoe dropped in a subsequent action filed in federal court in Arizona. The defendants raised a *res judicata* defense to the plaintiffs' claim, pointing to the class action settlement. The Ninth Circuit rejected the defendants' arguments, holding that the class action did not have a res judicata effect on absent plaintiffs over whom the district court in the original class action did not have personal jurisdiction. *Brown*, 982 F.2d at 392. The court relied on *Shutts* and held that the absent plaintiffs' money damage claims could not be foreclosed by a rule 23(b)(1) class action, because the action did not include a right to opt out. *Id.* [23]

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[23]The court also held that the absent plaintiffs' claims for injunctive relief were barred by *res judicata* because the class action could bind absent plaintiffs on their claims for equitable relief. *Brown*, 982 F.2d at 392.

2. Conflict with Shutts.

The majority's approach to classifying this action is also fundamentally at odds with the approach used by the *Shutts* Court. The exception in *Shutts* is for actions seeking "equitable relief," not for class actions that have their origins in equity.[24] The Court explicitly recognized that class actions originated as an equitable joinder device, and *all* class actions are "equitable" in that limited sense. *Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73. *See also Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940) ("The class suit was an invention of equity...."); 7A WRIGHT & MILLER § 1751, at 7. Despite that fact, the Court classified the action in *Shutts* as one for money damages. 472 U.S. at 811, 105 S.Ct. at 2974.

The only possible conclusion that can be drawn from the Court's reasoning is that the distinction between damage remedies and equitable remedies turns on what remedies the plaintiff seeks, not on his choice of joinder devices. To hold otherwise, as the majority does in this case, would create an internal inconsistency in *Shutts:* If the origin of the class action

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[24]It is notable that the *Shutts* Court used the phrase "equitable relief." *Shutts*, 472 U.S. at 812 n. 3, 105 S.Ct. at 2974 n. 3. Equity courts were distinguished from law courts in that their substantive rules, procedures, and remedies differed from law courts. 1 LAW OF REMEDIES § 2.6(3) at 154-55. As one commentator pointed out, procedure "will seldom if ever form a basis for distinguishing law from equity" where the distinction matters. *Id.* at 155 n. 1.

The question then becomes whether the class action is an equitable remedy or an equitable procedural device. I discuss why the rationale of *Shutts* supports that latter interpretation at *infra* part IV.B.3. Further support for the obvious proposition that the class action is a procedural tool comes from the fact that it has never been treated as a "remedy." See 1 LAW OF REMEDIES §§ 1.1-1.6 (listing all remedies available at law and equity).

is determinative of the classification of an action, then every class action, including the one in *Shutts*, would be an equitable action.

3. Misunderstanding Equitable Remedies.

The majority's assertion that rule 23(b)(1)(B) actions are unique in that they involve only equitable claims is based on an apparent misunderstanding of "equitable remedies" and the history of the class action. Prior to the merger of law and equity, the majority would have been correct in classifying all rule 23(b)(1)(B) class actions (or more appropriately their historical antecedents) as equitable actions, but for reasons different from those the majority offers.

Before law and equity were merged, every class action would have been equitable, as the class action was a procedural device that was available only in courts of equity.[25] As a result, every class action aggregated claims seeking equitable remedies or applying equitable substantive law. The fact that the device was once used exclusively by equity courts does not foreclose the possibility, however, that the device currently is used in conjunction with legal remedies.[26]

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[25]The class action originated in courts of equity as a procedural joinder device. *See generally* 1 LAW OF REMEDIES § 1.1, at 1-2 (distinguishing procedural law, substantive law, and remedial law); *id.* § 2.1(1), at 57 (noting that differing procedures were available in equity and legal courts).

[26]In similar situations, where an equitable procedural device has been extended to actions at law, courts have used at least two distinct tests for determining equitable status. The first test focuses on the remedy: If the claim seeks a coercive remedy, it is deemed equitable. The second test characterizes a claim as equitable if the plaintiff seeks to enforce a right that was originally

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Even the majority's own authorities recognize that class actions are now used to aggregate *both* legal and equitable claims. See 1 NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that suits certified under rule 23(b)(1) "predominately (but not exclusively) involve suits seeking equitable relief"). When Professor Newberg posits that *Shutts* will not apply to classic limited fund cases, he does so because those cases aggregate equitable claims, not because the device had its origins in equity.

> It is unlikely that *Shutts* will be construed to change the highly focused nature of the *equitable relief* addressed in these limited fund class actions by requiring opt-out rights which might serve to frustrate the equitable ends of these suits. There are other types of equitable class actions, such as suits to declare a dividend or suits for injunctive relief against a defendant who has acted generally against a class, which similarly ... will not be challenged.

Id. § 1.21, at 1-49 (emphasis added, footnotes omitted).

4. Formalistic Distinctions.

The majority's unyielding mantra that rule 23(b)(1) actions are equitable actions makes due process turn on an untenable formalistic distinction between rule 23(b)(1) and rule 23(b)(3), whereunder class actions under rule 23(b)(3) are subject to *Shutts*, and those certified under rule 23(b)(1) are not.

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[26](...continued)
created in the equity courts, or a right that was traditionally decided according to equitable principles. 1 LAW OF REMEDIES § 2.6(3), at 154-55.

The distinction finds no support in *Shutts*, which involved a state equivalent of rule 23(b)(3) and not the federal rule itself. The Court's analysis, which centered on the need to protect an absent plaintiff from the inherent dangers of representative actions, did not focus on what type of class action was involved, for relying on such a distinction ignores the fact that many class actions can be certified under more than one subsection of rule 23. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-4 through 4-5; 3B J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 23.31[3], at 236-37 (2d ed. 1995); 7A WRIGHT & MILLER §1772, at 425. In fact, a vast majority of classes that meet the requirements of rule 23(b)(1)(B) inevitably will satisfy the rule 23(b)(3) requirements. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-5. Due process does not turn on such formalistic distinctions.[27]

C. The Distinction Between Law and Equity.

The majority's argument that applying *Shutts* to rule 23(b)(1) would render all mandatory class actions unconstitutional, is also premised on a faulty understanding of

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[27] *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299, 109 S.Ct. 2909, 2933, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting in part) (stating that "the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law"); *Escobedo v. Illinois*, 378 U.S. 478, 486, 84 S.Ct. 1758, 1762, 12 L.Ed.2d 977 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell v. Benson*, 285 U.S. 22, 53, 52 S.Ct. 285, 293, 76 L.Ed. 598 (1932) (opining that "regard must be had, ... in ... cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required"); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897) ("In determining what is due process of law regard must be had to substance, not to form.").

the distinction between law and equity. *See* maj. op. at 987 n. 16. What the majority fails to acknowledge is that the distinction between money damages and equitable remedies preserves mandatory class actions in the vast majority of cases, including traditional common fund cases from equity. *See* NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that the majority of actions that meet the requirements of rule 23(b)(1) seek equitable relief). The only cases affected by *Shutts* are modern cases, such as *Ahearn*, that fall within the broad scope of the rule but do not involve a true common fund.

Take for example *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 14 L.Ed. 942 (1853), and *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1914), two cases that represent the paradigmatic mandatory class action. Both survive *Shutts* because neither involved money damages. In *Smith*, the class representatives filed a bill in chancery for the division of a trust, a traditional equitable remedy.[28] 57 U.S. (16 How.) at 312. *See* 1 LAW OF REMEDIES § 2.3(1), at 75. In *Ibs*, the mandatory class action at issue also involved distributions from a trust. [29] 237 U.S. at 671, 35 S.Ct. at 695.

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[28]The suit was over proceeds from a book fund maintained by the Methodist Episcopal Church. *Smith*, 57 U.S. (16 How.) at 303. The fund was established for the care of traveling preachers. *Id.* When the church divided over slavery, both sides agreed to split church property based upon a prearranged formula. *Id.* at 305. The traveling preachers from the south sued the northern church because it refused to relinquish that portion of the fund that belonged to the southern church. *Id.*

[29]*Ibs* involved a suit, for money damages, by a participant in a mortuary fund in state court. The question was whether a prior mandatory class action would have a *res judicata* effect on the plaintiff. The class action was

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Although both actions resulted in a distribution of money, neither involved a legal claim for money damages. *See* 1 LAW OF REMEDIES § 3.1 (discussing money awards available in equity, but distinguishing between money damages and equitable remedies that award money).

The difference between legal and equitable actions, while subtle, is important. In an equitable action such as an action by the beneficiary of a trust, a plaintiff's *pro rata* rights to the trust corpus are already established. Whether the action proceeds individually or as a class action is irrelevant to absent plaintiffs, because in both cases their rights in the corpus of the trust will be affected. See *In Re Joint E. & S. Dist. Asbestos Litig. ("Findley II")*, 878 F.Supp. 473, 530-33 (E. & S.D.N.Y.1995) (explaining why the already severe limitations on a trust beneficiary mean that a representative action will do little to diminish a beneficiary's rights). In fact, in some cases the class device enhances an absent plaintiff's rights by providing him a voice; the classic limited fund is such a case. The same is not true in a case for money damages.

The decision to proceed individually or as a class makes all the difference in a case for money damages, because only in a class action are a plaintiff's rights controlled by another party. The most obvious consequence of such control is that class representatives may settle to the detriment of absent class members in order to benefit themselves. The inherent risk of such a result is exactly what drove the Court to adopt due

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[29](...continued)
against an insurance company and sought to compel the company to make distribution from a trust. The court held that the action against the trust must be given *res judicata* effect in the later proceeding.

process protections in such cases. See *Shutts*, 472 U.S. at 809-11, 105 S.Ct. at 2973-74.

D. Unconstitutional Use of the Federal Rules.

Finally, the majority's reliance on the strong presumption of constitutionality that the Federal Rules of Civil Procedure receive is misplaced. The novelty in this case is not the insistence on opt-out rights but on the extension of class actions, particularly rule 23(b)(1)(B) class actions, to mass torts and the expansion of rule (b)(1)(B) to "constructive bankruptcy." Such a use of the federal rules is novel, and in particular the rise of mass torts was unforeseen by the drafters of the rule. *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 & n. 23 (5th Cir.1996).

The majority's attempt to hide behind the traditional acceptance of mandatory class actions is unavailing in this extension of rule 23(b)(1), for the presumption of constitutionality enjoyed by the Federal Rules of Civil Procedure disappears when the rules are applied in a way unanticipated by their drafters. *See* 19 WRIGHT & MILLER § 4509. In short, while this action falls within the broad scope of rule 23(b)(1)(B), that fact does not immunize it from due process protections, including opt-out rights.[30]

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[30]The appellees argue that even if due process requires an opt-out right, the settlement's "back-end" exit satisfies due process. Even if a "back-end" exit could serve as a proxy for an opt-out provision--a suggestion made only by the Fourth Circuit--the procedure provided in *Ahearn* falls far short of satisfying due process. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.) (finding that a "back-end" exit right provides "everything that an express opt-out provision could give a class member if such right is required under due process"), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989).

(continued...)

V. Commonality and Typicality.

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[30](...continued)

In *A.H. Robins*, the court could determine with confidence that the "back-end" exit provided absent plaintiffs with the same rights they would have in an opt-out class action. The class action involved a trust established during a chapter 11 bankruptcy. *A.H. Robins*, 880 F.2d at 717. An absent class member could seek a jury trial if the alternative dispute resolution provided for by the trust did not settle the plaintiff's claim in a satisfactory fashion. *Id.* at 722. Liability, causation, and damages would be submitted to the jury. *Id.* Punitive damages were disallowed, but a plaintiff seeking a jury trial would be entitled to an amount from the trust in lieu of the punitive damage award. *Id.* The exit mechanism left absent plaintiffs a right to a jury trial on precisely those issues on which they had a right to a jury trial before certification. *Id.* at 744 ("The Plan gives every such class member the right to have her claim settled in a trial with all the procedural rights opt-out provision could give a class member if such right is required under due process.") The "back-end" exit in this case fails to provide absent plaintiffs with a right substantially equivalent to a jury trial. The exit is nothing more than window dressing. While it allows claimants to settle disputes in front of a jury, it limits all damages to $500,000. By contrast, some plaintiffs have been able to recover several million dollars from asbestos defendants at trial. *See, e.g., Mechanic's Family Awarded $14 Million in Auto Brake Asbestos Case*, WEST'S LEGAL NEWS, June 20, 1996, at 1996 WL 339400 (discussing asbestos verdict for two plaintiffs); *Asbestos Litigation--Damages*, CHI. DAILY LAW BULLETIN, June 13, 1995, at 1 (discussing $12 million verdict); *Notable Verdicts*, NAT'L LAW JOURNAL, Apr. 15, 1996, at A15 (discussing $2.2 million jury verdict); *Reviewing Verdicts for Excessiveness*, NEW YORK L.J., Apr. 10, 1996, at 1 (discussing verdicts of $64.6 million for four plaintiffs); *$18 Million Verdict for Asbestos Claims*, NEW YORK L.J., Feb. 15, 1996, at 2 (discussing verdict for five plaintiffs). Such a severe limitation on a party's ability to prove and try damages deprives him of an essential element of a jury trial. I certainly cannot say that a procedure that caps a plaintiff's damages gives him "everything that an express opt-out provision could give a class member." *A.H. Robins*, 880 F.2d at 744.

The majority is correct that our precedents preclude us from decertifying the class for lack of commonality and typicality. The majority's discussion of these criteria is misleading, however, and its readiness to skip over the protections without considering the consequences is yet another manifestation of its tunnel vision.

A. Circuit Precedent.

Long before defense attorneys even dreamed of mandatory, mass-tort, futures- only class actions, we held that "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Meat Price Investigators Ass'n v. Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167, 174 (5th Cir.1979), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). We even went so far as to "agree" with Professor Newberg that parties may "compromise their differences, including class action issues, through this means." *Id.* at 177-78 (quoting 3 NEWBERG ON CLASS ACTIONS § 5570c, at 476). We took *Beef Industry* to its logical conclusion two years later, finding that evaluation of the fairness of a settlement entails a consideration of "the strength of plaintiffs' case on the merits," including "the risks of class decertification." *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 216 (5th Cir.1981).

Note the bizarre effect of these opinions: Certification criteria are designed in part to protect the class against inadequate representatives, but *Beef Industry* permits those very representatives to compromise the requirements. *Corrugated Container* compounds the effect by holding that certification criteria are part of the merits of a class action. Thus, when it is

less likely that certification is proper, and therefore more likely that an individual plaintiff has a right to prosecute his own action, a *smaller* settlement is necessary to extinguish that right.

The majority is more subtle, finding that all class members have a common interest in reaching a settlement that includes certain terms. *See* maj. op. at 975. Even so, a generalized common interest is not a "*question[ ] of law or fact* common to the class." FED.R.CIV.P. 23(a)(2) (emphasis added).

Similarly, the majority finds that the legal and remedial theories of the class representatives are typical of those of the class because all class members (1) claim that "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos" and (2) possess a common interest in settling for a large amount. See maj. op. at 975-76. Once again, the latter category of "interests" has nothing to do with the underlying legal theories.

The majority's characterization of the plaintiffs' claims is also true only at an extreme level of generality. If a man raped a woman in California and exposed himself to another in Texas, both women might claim that he is "liable in tort for damages incurred due to [sexual misconduct]," but no one would seriously claim that the legal theory of battery is similar to that for, say, intentional infliction of emotional distress.

Nor have the settling parties even attempted to bootstrap themselves into typicality by crafting a settlement that postpones resolution of non-typical issues. The settlement's prohibition on punitive damages affects plaintiffs from different states differently; its caps on individual recovery discriminate against the most seriously injured class members; and its spendthrift

provisions alter the distribution of funds between extant and latent claimants. Thus, the settling parties *have* negotiated an alteration of the class members' substantive rights *vis-a-vis* one another. In short, the majority dutifully follows our precedent by treating commonality and typicality as mere procedural obstacles to be cleared out of the way.

B. Problems with Circuit Precedent.

Three factors make our duty to follow *Beef Industry* and *Corrugated Container* a regrettable one. First, rule 23(a) has a purpose: to protect the due process rights of absent class members. [31] Compliance with the rule might prevent us from lumping people with divergent interests into a single class, but the rule is meant to do just that. [32]

Second, the difficulty inherent in assessing the substantive fairness of a settlement makes prophylactic procedural protections crucial to the protection of absent plaintiffs. [33] The range of "fair" settlements is wide in any case,

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[31] *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); 1 NEWBERG ON CLASS ACTIONS § 1.13, at 37-38.

[32] *See* Marcus, *supra* note 4, at 899-90 (criticizing Ahearn settlement).

[33] *See Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 683 (7th Cir.1987) ("The agency problems which [class] actions create require that the district judge be vigilant in protecting the procedural rights of class members."); cf. 7B WRIGHT & MILLER § 1785, at 103 ("A formal class certification determination plays an important role in assuring adequate protection to the absent class members.").

[34] and settlement classes present unique opportunities for collusion between class counsel and defendants. [35] Once the machinery of a settlement class action is set in motion, the judiciary has a very hard time controlling it; thus, it is critical that we craft that machinery well.

Finally, the majority once again fails to consider the interaction of these due process protections with the others it denies. Professor Newberg, the primary proponent of settlement classes, justified relaxing the rule 23(a) criteria by looking to other protections, most notably opt-out rights, to protect the class. *See* 2 NEWBERG ON CLASS ACTIONS § 11.28, at 60-61. Similarly, the *Beef Industry* court observed that opt-out rights would help "offset" the loss of other protections. *See* 607 F.2d at 175. Thus, relaxing rule 23(a) criteria and denying opt-out rights make for a lethal combination. [36]

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[34]*See* Koniak, *Looking Glass, supra* note 4, at 18 ("A poisoned or tainted pudding may taste okay, if not delicious.").

[35]*See supra* page 1008; *General Motors*, 55 F.3d at 788; Coffee, *supra* note 1, at 1378-82.

[36]While I would follow *Beef Industry* and *Corrugated Container* reluctantly, the majority actually embraces them on the ground that settlement negotiations generate information. *See* maj. op. at 975-76. While it is hard to argue in favor of ignoring information, settlement negotiations generate little information regarding commonality and typicality, and it is the majority that ignores any such information.

First, no competent counsel would enter negotiations without first divining his clients' legal theories and the questions of law or fact underlying them. Thus, "the process of negotiation does not reveal anything about commonality and typicality." *General Motors*, 55 F.3d at 796.

(continued...)

VI. Inadequate Representation.

That leaves two significant due process requirements, the first of which is adequate representation. Instead of vigorously enforcing this requirement, however, the majority lets it slide as well.

A. Standard of Review.

In ordinary litigation, a plaintiff does not need the court to ensure that his attorneys are performing adequately; he can monitor and control them himself. In class litigation, however, class members have no practical control over their attorney.[37] Their only remedy against shoddy representation is to opt out of the class, but the district court denied them even that protection. Having left class members defenseless against their own counsel, the court's duty to ensure adequate representation became all the

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[36](...continued)

Second, this justification for relaxing the requirements is inconsistent with the majority's application of them. To the extent that diverging interests emerge in negotiations, those interests militate against mass certification, as they indicate that class counsel negotiated the settlement while suffering from a conflict. The majority relies upon the existence of information in relaxing the criteria, but ignores that information when applying them.

Finally, the majority's emphasis on information is ironic. Conventional wisdom posits that early settlement *decreases* the amount of information available to counsel and the court. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION 3D § 30.45, at 243 (1995).

[37]In theory, the class representative should control the attorney. In practice, class counsel often selects the class representative and is likely to pick one who is passive. *Cf. In re Dresser Indus.*, 972 F.2d 540, 545 n. 11 (5th Cir.1992) (noting consent of client in a class action is of "limited utility" as a safeguard against conflicts of interest).

more critical. Rule 23(a)(4) prohibits a court from certifying a class without first ascertaining that it will receive adequate representation. Rule 23's concerns are not merely prudential, but constitutional: Due process demands that class members receive adequate representation before they are bound by a judgment. [38] An attorney who labors under a conflict of interest cannot satisfy the requirements of rule 23(a)(4). [39]

We must not confuse rule 23(a)(4) with rule 23(e), which scrutinizes only the substantive fairness of a settlement.

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[38] *See Woolen v. Surtran Taxicabs*, 684 F.2d 324, 332 (5th Cir.1982) ("The adequacy of representation in Rule 23(a)(4) is that essential to due process under *Hansberry v. Lee*], 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940),] before absent class members can be bound."); *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir.1973) ("The judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation.") (quoting *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961)).

[39] *See North Am. Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n. 4 (5th Cir.) (reasoning that attorney's conflict of interest could prevent class certification under rule 23 because of "the important role the attorney plays in protecting the interests of the class"), *cert. denied*, 444 U.S. 956, 100 S.Ct. 436, 62 L.Ed.2d 328 (1979); *see also In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir.1980) (concluding that attorneys with conflict of interest do not meet the adequate representation requirement of rule 23(a)(4)).

[40] Rule 23(a)(4) guarantees due process, and a substantively adequate result cannot cure procedural injustice. [41]

More importantly, substantive adequacy does not necessarily mean that a settlement is truly fair; an attorney who negotiated an adequate settlement might have negotiated a better one but for a conflict of interest.[42] Indeed, it would be

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[40] *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.) ("We also reject the district court's finding that its authority to approve settlement offers under Fed.R.Civ.P. 23(e) acts to limit the threat to the class from a potential conflict of interest."), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987).

[41] [D]ue process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process. A 'fairness' hearing that appraises a settlement made outside the court's presence only as to the substantive fairness of the terms provides no more process than would be provided by a post-lynching hearing that assessed whether the dead guy really did commit the crime.

Koniak, *Feasting, supra* note 4, at 1123.

[42] *See Corrugated Container*, 643 F.2d at 211 n. 25 ("We hasten to add that the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position.").

> The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.

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odd if rule 23(a)(4) did require a court to examine the terms of a settlement; rule 23(a)(4) is a certification requirement, and certification usully precedes settlement. Rules 23(a)(4) and 23(e) are complements, not substitutes; a court applies rule 23(a)(4) before certification to insure procedural fairness and rule 23(e) after settlement to guarantee substantive adequacy.

We apply a mixed standard of review to a district court's determination that a conflict of interest does not exist. The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review de novo. *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir.1995) ("we interpret the controlling ethical norms governing professional conduct as we would any other source of law") (quoting *Dresser*, 972 F.2d at 543); *see also id.* (stating that "we will perform a 'careful examination,' or *de novo* review, of the district court's application of the relevant rules of attorney conduct"). No factual dispute exists in this case, and therefore we must review the district court's decisions *de novo*.

B. Class Counsel's Financial Conflict.

Ness Motley represented the class during settlement negotiations despite a financial interest in reaching a settlement that diverged from the class's interest. A divergent financial

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[42](...continued)
Haudek, *The Settlement and Approval of Stockholders' Actions--Part II: The Settlement*, 23 SW.L.J. 765, 771-72 (1969), *quoted in In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n. 24 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 and *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

interest is a paradigmatic conflict of interest, yet the majority refuses to concede that this conflict may have denied the class adequate representation.

The conflict stemmed from Ness Motley's simultaneous representation of both the class and individual plaintiffs who were also suing Fibreboard. While the class settlement negotiations were proceeding, Fibreboard and Ness Motley agreed to settle all of Ness Motley's pre-existing individual lawsuits for a higher-than-average amount. That settlement was partly contingent, however, on Ness Motley and Fibreboard's settling the class claims.

If the class did not settle its claims, Fibreboard would still pay half of the individual plaintiffs' settlement, but they would receive the entire settlement if the class settled. [43] Because Ness Motley represented the individual plaintiffs, but not the class, on a contingency basis, it had a financial interest in settling the class claims on any terms whatsoever, even if those terms were unfavorable to the class.

The majority dismisses this conflict by pretending that Ness Motley, the individual plaintiffs, and the class had similar interests in reaching a class settlement. This is simply wrong. Ness Motley and the individual plaintiffs had a financial interest in seeing the class settle on *any terms*. In contrast, the class desired a settlement only if it was more lucrative than the alternative--awaiting the outcome of the coverage case. The expected value of that alternative was significant. If the California Supreme Court affirmed the two lower courts that had ruled favorably for the class, the class would enjoy a

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[43]The individual plaintiffs also would receive the entire settlement if Fibreboard won the coverage case.

practically unlimited compensation fund. Accordingly, it is easy to imagine a proposed settlement beneficial to Ness Motley and the individual plaintiffs but unfavorable to the class.

The district court never should have allowed Ness Motley to represent the class. Rule 23(a)(4) simply does not permit an attorney to represent a class if he suffers from a conflict of interest. It does not matter whether Ness Motley negotiated a favorable settlement; rule 23(a)(4)'s concerns are procedural, not substantive. Even if, arguendo, the settlement was favorable, an unconflicted attorney might have negotiated a better one. Fibreboard's attorneys knew that Ness Motley had an interest in settling on any terms, and they undoubtedly converted this knowledge into negotiating leverage.

The conflict of interest in this case was direct and egregious. But I would go a step further and prohibit class counsel from ever simultaneously representing individual plaintiffs in cases such as this, as there is too great an opportunity for corruption.

Consider the different fee structures a plaintiffs' attorney faces in class and individual litigation. As class counsel, he will be compensated under the lodestar formula, [44] leaving him no financial stake in the settlement. When representing an individual

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[44]Under the lodestar formula, a court determines a class attorney's compensation by multiplying the number of hours he has spent on the litigation by an appropriate hourly wage. While the court may determine the hourly wage in part by looking to how favorable a settlement the attorney negotiated, the number of hours the attorney has worked is usually the chief determinant of his total compensation. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.CHI.L.REV. 1, 50 (1991).

plaintiff, he will receive a contingency fee, vesting him with a significant financial stake in the outcome of the litigation.

A shrewd but unethical attorney will accept a significantly smaller settlement in a class action in exchange for a more modest increase in an individual settlement. And even an attorney who would refuse such an outright bribe might be tempted to make concessions during the class negotiations, hoping to develop goodwill that will pay dividends when negotiating over the individual lawsuits. This is not simply a theoretical problem. Consider the *Georgine* case, in which Ness Motley also simultaneously represented the class and individual plaintiffs. While negotiating the class settlement, Ness Motley and the *Georgine* defendants settled the individual claims for a total of about $138 million. Koniak, *Feasting, supra* note 4, at 1067. Under the terms of the class settlement, on the other hand, the individual plaintiffs would have been entitled to a *maximum* of about $90 million. *Id.*

At the least, in *Georgine* Ness Motley treated the individual plaintiffs preferentially. At worst, Ness Motley obtained a concession from the defendants at the expense of the class. In either case, it acted improperly and to the detriment of the class, and it is to prevent such behavior that I would prohibit simultaneous representation altogether.[45]

C. The Conflict Between Extant and Latent Claimants.

Another conflict of interest arose from the class attorneys' simultaneous representation of both class members

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[45]See Koniak, *supra* note 4, for a more extensive discussion of the perils of simultaneous representation.

with extant claims and those with latent claims.[46] Because they may seek recovery from the settlement fund immediately, extant claimants would profit from high ceilings on recovery or none at all, as there was little danger that the fund would be depleted before it paid their claims. Latent claimants, on the other hand, cannot seek recovery until some triggering event occurs.[47] Because they may be unable to file a claim for a number of years, they would benefit from damage caps low enough to ensure that the settlement fund will not dry up before it pays their claim.

The majority fails to recognize this obvious conflict of interest. In fact, it makes no mention of the Third Circuit's holding in *Georgine* that an impermissible conflict of interest occurs whenever extant and latent claimants are represented by

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[46]The majority misleadingly labels these groups as "near" and "far" futures, which suggests that the difference between these groups is simply one of degree. In fact, there is a difference in kind. All of the extant claimants, or " 'near' futures," may file claims as soon as approval of the settlement is final. But none of the " 'far' futures" may file suit until some triggering event occurs, and they have no way of knowing when, or even whether, that event will occur.

[47]State law determines exactly what is the necessary triggering event. Some states permit exposure-only victims to seek recovery, while others require that a claimant develop some illness from his exposure before permitting him to recover. One group of latent claimants, of course, are the future family members of asbestos victims: future spouses and unborn or even unconceived children. For this group, the necessary triggering event is marriage or birth.

the same attorney.[48] *Georgine* 's analysis is worth quoting at length:

> The most salient conflict in this class action is between the presently injured and futures plaintiffs. As rational actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty of forecasting what their futures hold, they would probably desire delayed opt out like the one employed in *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D.Ohio 1992) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject

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[48]The majority does distinguish the case before us from *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir.1992), on the ground that certain members of the class in that case had rights under a trust agreement to have their claims paid first, while there is nothing akin to a trust agreement in *Ahearn*. But *Georgine* also lacked anything similar to a trust agreement, so the distinction does not explain the majority's failure to distinguish *Ahearn* from *Georgine*.

> guaranteed compensation and sue for damages at that time).
>
> In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more people locked into the settlement, the more likely it is to survive. *In sum, presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa.*

Georgine, 83 F.3d at 630-31 (emphasis added).

The majority's only explanation for its decision is that the district court's determination that a conflict did not exist was supported by the testimony of the settling parties' expert, Geoffrey Hazard, and the district court's own expert, Eric Green. That explanation is hardly compelling.

The district court's determination that the facts before it did not amount to a conflict of interest was not a finding of fact to which we should defer. Instead, it is a conclusion of law, *see United States Fire Ins. Co.*, 50 F.3d at 1311 (holding that we review *de novo* a district court's application of ethical norms governing attorney conduct), and it is not enough simply to note that two hand-picked law professors--one chosen by the settling parties and the other by the district court--had the same opinion of the law as did that court.

Nor is the reasoning behind the legal opinions of Professors Hazard and Green persuasive. According to the majority, both concluded that a conflict did not exist, essentially because both extant and latent claimants would be better off with a settlement than without one. If that was their reasoning, they asked the wrong question.

Even if there was no conflict between extant and latent claimants as to *whether* a settlement was a good idea, there was undeniably a conflict between the two groups over the *terms* of the settlement. It may well have been appropriate for the same attorneys to represent extant and latent claimants when negotiating with the defendants over the total amount of the settlement. Once the parties agreed to an amount, however, the interests of extant and latent claimants diverged, and they should have been represented by different attorneys for determination of the terms under which the settlement would be distributed to the class.

D. The Conflict Between Pre-and Post-1959 Victims.

The global settlement achieved a massive redistribution of wealth. Before the settlement, persons who had been exposed to asbestos before 1959 had far more valuable claims than those who had been exposed after 1959. Fibreboard's insurance policies had expired in 1959, so pre-1959 claimants could seek damages from an insured Fibreboard, with virtually unlimited assets, while post-1959 claimants could only hope to recover from the non-insurance assets of Fibreboard, which amounted to very little. As late as 1993, the settlement value of

a pre-1959 claim was three times that of a post-1959 claim. [49] The global settlement, however, eliminated the privileged status of pre-1959 claimants and placed them on equal footing with their post-1959 counterparts.

Because the settlement deprived pre-1959 claimants of a substantial right, they were entitled to separate representation. The majority contends that the class as a whole benefited by sacrificing the special rights of pre- 1959 claimants, and I emphatically agree. That is precisely the problem: It was in the best interest of one part of the class to give up something that belonged to another part of the class, and that created a conflict of interest.

Unitary class counsel was bound to consider the interests of the class as a whole, and those interests required giving up the rights of pre-1959 claimants. But the rights of pre-1959 victims were theirs alone, and they were entitled to counsel who would not relinquish those rights unless it was in their own best interest. Only separate counsel, representing pre-1959 claimants alone, could have done so.

Nor am I persuaded by the majority's contention that Fibreboard would never have negotiated separately with pre-1959 claimants and that unitary representation maximized the value of the settlement. So long as the class was negotiating

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[49] Fibreboard's pre-1959 claims settled for an average of $12,000 in 1993, while its post-1959 claims settled for only $4,000. *See GAF, Fibreboard, Pfizer Report Decline in Asbestos Cases*, MEALEY'S LITIG. REP., June 2, 1995, at 20. In 1994, the discrepancy almost disappeared, with pre-1959 claims settling for $8,000 and post-1959 claims settling for $7,000. *Id.* As the asbestos world became aware that the expected settlement in *Ahearn* would not differentiate between pre- and post-1959 claimants, the settlement values of those claims naturally moved toward a common figure.

with Fibreboard over the total value of the settlement, there was no need for separate representation, as pre- and post-1959 claimants had the same interest in obtaining as large a settlement as possible. It was only after the parties had agreed on the total amount of the settlement and had begun to bargain over how it should be divided among the class that pre-1959 claimants needed separate representation. There is no reason to suppose this would have any effect on Fibreboard's willingness to make concessions; it was interested only in the total amount of the settlement, not the allocation of the settlement within the class.

VII. Impartial Judging.

The second due process requirement that the majority fails to enforce is impartial judging. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Thus, a litigant is entitled to try his case before a judge who is free of any personal stake in the outcome. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).

This protection is vitally important in a mandatory class action, for the judge is the only person able to protect class members from an unjust settlement. The class members themselves cannot reject the settlement, and they cannot even reject certification by opting out of the class. They can only present their objections at the fairness hearing and hope the judge will reject the settlement as inadequate. If the judge himself is biased in favor of an unfair settlement, then the class has no protection against it.

The intervenors raise serious questions regarding Chief Judge Parker's ability to conduct an impartial fairness hearing.[50] He had mediated the settlement negotiations, undoubtedly urging the parties to settle on terms he believed to be fair, before the case was even filed. In his lengthy opinion approving the settlement, he referred to his "assistance in the discussions" leading to final agreement. 162 F.R.D. at 516.

Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and painstaking efforts, probably developed a natural bias in favor of his own work. [51]

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[50]It is well settled that impartiality can reasonably be questioned even where there is no actual bias. *See In re Faulkner*, 856 F.2d 716, 721 (5th Cir.1988) (per curiam).

[51]For similar reasons, Congress in 1978 limited the administrative duties of bankruptcy judges. Under the old Bankruptcy Act, bankruptcy judges (then called referees) had been actively involved in the day-to-day affairs of bankruptcy reorganizations. Congress found this objectionable.: "No matter how fair a bankruptcy judge is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum." H.R.REP. NO. 595, 95th Cong., 1st Sess. 88 (1978), reprinted in 1978 U.S.C.C.A.N. at 6050. Congress went on to note that "[d]eeper problems arise because of the inconsistency between the judicial and administrative roles of the bankruptcy judges. The inconsistency compromises his impartiality as an arbiter of bankruptcy disputes." *Id.* at 89, *reprinted* in U.S.C.C.A.N. at 6050. To rectify this problem, Congress limited the role of bankruptcy judges as administrators and mediators. *See, e.g.*, 11 U.S.C. s 341(c) (1994) ("The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.").

The majority concludes that the judge need not have been recused from the fairness hearing, because the settlement negotiations he mediated were a judicial proceeding. I am not so certain. I agree that we are governed by *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), and that if the settlement negotiations were a judicial proceeding, recusal was not required. I also agree that if the negotiations were a judicial proceeding, we must make a case-specific determination: A judge may become so involved in settlement negotiations as to warrant recusal even though the negotiations were judicial proceedings. See id. at ----, 114 S.Ct. at 1157 (noting that recusal may be warranted where bias stems from a judicial source if it amounts to "a deep-seated favoritism or antagonism that would make fair judgment impossible"). As the majority points out, Chief Judge Parker's involvement in this case was not substantial, and recusal is therefore not required unless the settlement negotiations were extrajudicial proceedings.

I part ways with the majority, however, when it comes to deciding whether the settlement negotiations the judge mediated were judicial proceedings. The majority concludes that they were, though its only explanation is to state that "Judge Parker's role in the negotiation process ... stemmed from three cases filed in his court [i.e., the assignment litigation]." I agree that if the negotiations were a legitimate part of the proceedings in the assignment litigation, they were judicial proceedings. Chief Judge Parker's judicial authority was limited to the assignment litigation, however, and I do not believe that he could conduct judicial proceedings with respect to Ahearn simply because it was somehow related to the assignment litigation.

Remember that the parties had not even filed Ahearn yet. Thus, any time the judge spent mediating that dispute--as opposed to the insurance cases filed in his court--was community service, not judging. [52]

The rules of civil procedure allow judges to participate in settlement conferences. See FED.R.CIV.P. 16(a)(5) (allowing courts to schedule conference "facilitating the settlement of the case"). Rule 16 settlement conferences are judicial proceedings and generally are not an adequate basis for recusal. *Cf. Liteky*, 510 U.S. at ----, 114 S.Ct. at 1157 (noting that judicial proceedings "can only in the rarest circumstances" form an adequate basis for recusal). The question is whether Chief Judge Parker mediated the settlement negotiations in the course of a rule 16 conference.

If the settlement negotiations he mediated were chiefly negotiations over the assignment litigation, and settling *Ahearn* was incidental to settling the assignment litigation, the negotiations probably amounted to a rule 16 conference. If, on the other hand, the primary object of the negotiations was to settle *Ahearn*, the negotiations do not fall within the bounds of rule 16. That rule allows judges to schedule conferences only to settle "the case," which surely must mean the case filed and pending before the judge. Rule 16 cannot permit a judge to order settlement conferences over cases that are not before him--that would be an exercise of power the Constitution does not permit. See U.S. CONST. art. III, § 2 (limiting judicial power to actual cases or controversies). Federal courts are not roving engines of justice careening about the land in search of

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[52]Certainly there can be no criticism of Judge Higginbotham's role. From the start, he served only as a mediator, not a judge. In facilitating agreement, he did precisely what a mediator is supposed to do.

wrongs to right. Rather, federal courts were designed to be much like all other courts: passive entities resolving only the quarrels which are properly put before them by interested parties and which are within the competence of courts in a tripartite system of constitutional government.

Haitian Refugee Ctr. v. Civiletti, 503 F.Supp. 442, 461 (S.D.Fla.1980), *modified*, 676 F.2d 1023 (5th Cir. Unit B 1982).

I seriously doubt that Chief Judge Parker was conducting settlement negotiations over the assignment litigation and only incidentally settled *Ahearn* along the way. If so, this is one of the more amazing examples of a tail wagging a dog. I recognize, however, that the content and nature of the settlement negotiations the judge mediated present a question of fact, and I therefore would remand to the district court for findings in this regard.

VIII. Article III Justiciability.

Finally, the majority simply fails to consider a number of difficult justiciability issues. While questions of Article III standing and variances in state law may seem somewhat rarefied, it is important to remember the central purpose of jurisdictional requirements--to keep us in our place. The constitutionally-assigned task of the federal judiciary is to resolve cases and controversies that Congress and the Constitution have authorized us to adjudicate. When we depart from that role by considering generalized grievances or private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges.

Failure to honor standing requirements, in particular, can result in devastating consequences for those we intend to help. As standing turns in large part on whether an individual has suffered an injury-in-fact, those who lack standing may be unaware that our legislative dalliances eventually will affect them; thus, they are unlikely to speak up for themselves.

This case presents a particularly egregious example, for the parties and the district court gerrymandered the class to exclude all those who were sufficiently concerned with their injuries to have filed suit. Thus, the class consists largely of people who are unlikely to monitor class counsel's performance or challenge the settlement. In a justice system that depends on robust adversarial presentations, that dynamic leaves the judiciary ill- equipped to evaluate the procedural and substantive fairness of the negotiations and eventual settlement.

This case shatters the constitutional limits placed on the authority of the federal courts by Article III, Section 2 of the United States Constitution. We are obligated to consider these issues, *sua sponte* if necessary, to assure ourselves that the district court properly exercised jurisdiction.[53] It is fairly obvious that here, the district court exceeded its jurisdiction in approving the class action settlement.

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[53]The Third Circuit pretermitted the jurisdictional issues raised in a nearly identical case because its decision to decertify the class disposed of the case in favor of the intervenors. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617, 623 (3d Cir.1996). Even in that case, one judge wrote separately to emphasize, *inter alia*, that the jurisdictional issues should have been reached. *See id.* at 635-38 (Wellford, J., concurring). The majority's decision to affirm certification in this case, however, obligates it to address--*sua sponte* if necessary--the troubling jurisdictional problems raised by the district court's approval of the settlement. Nevertheless, the majority has failed even to raise these issues, let alone consider them.

A. The Causes of Action.

The class action complaint alleges only personal causes of action against Fibreboard for money damages. [54] The majority agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." Maj.Op. at 975.[55] The district court also recognized that the compiaint alleges in personam claims. [56] Thus, *Ahearn* is a case-- admittedly an extraordinary one--involving multiple, *in personam*, state-law causes of action aggregated by means of rule 23, the federal class action device.

B. The Basis for Subject-Matter Jurisdiction.

The majority does not discuss the basis for subject-matter jurisdiction. The plaintiffs and the defendants, in their joint appellate brief, assert that federal jurisdiction was available under 28 U.S.C. § 1332 (diversity) and 28 U.S.C. § 1335 (interpleader). The district court's published opinion relies on diversity alone as a basis for federal jurisdiction. *See Ahearn*

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[54]The counts alleged are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." This last count consists of every "claim or cause of action" that the plaintiffs can assert "against Fibreboard."

[55]The majority also states that "*Ahearn* ... presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims." Maj. op. at 983.

[56]The district court actually stated that "[the] claims were, prior to the settlement, *in personam* in character." This statement implies that, in the court's view, the settlement transformed the claims into something other than in personam claims.

v. Fibreboard Corp., 162 F.R.D. 505, 522 (E.D.Tex.1995). In supplemental conclusions of law filed on the same day, however, the district court claimed that federal jurisdiction also is proper under the interpleader jurisdiction statute.

Diversity of citizenship was an arguable basis for subject-matter jurisdiction. Statutory interpleader jurisdiction is not available here, because there is no res or common fund. *See Wausau Ins. Cos. v. Gifford*, 954 F.2d 1098, 1100-01 (5th Cir.1992).[57] Even if interpleader jurisdiction were present, the weighty Article III justiciability issues would still exist.

These Article III issues arise out of the application of *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to this multi-state class action. As in cases

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[57]In *Wausau*, we were faced with "six insurance funds encompassing different periods during a four-year span." 954 F.2d at 1101. Furthermore, the legitimacy of the claims against each fund was not established. *Id.* Cautioning that "[i]nterpleader is not designed to solve all problems associated with multiparty litigation," *id.* (citing *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 535, 87 S.Ct. 1199, 1206, 18 L.Ed.2d 270 (1967)), we held: "Because the present case involves six separate funds and because it is unclear whether there are legitimate claims against each fund, we conclude that an identifiable fund as required for interpleader actions is not involved." *Id.*

In *Ahearn*, we are again faced with multiple funds--the policies issued by the two insurers, Continental and Pacific--and the legitimacy of the liabilities against the policies is not well-established--*i.e.*, the validity of all the class members' claims against Fibreboard has not yet been decided. Moreover, because of the potentially limitless liability under these comprehensive general liability policies, the ultimate scope of coverage cannot be determined until damages are awarded on each successful claim. The terms of the policies in *Wausau* at least limited coverage to a specific dollar amount; thus, the total possible liability was easily defined. Yet even there we held that interpleader jurisdiction was unavailable. It follows a fortiori from *Wausau* that such jurisdiction does not exist in *Ahearn*.

brought under the ordinary diversity jurisdiction statute, cases brought under statutory interpleader are governed by state substantive law, pursuant to the mandate of Erie. Thus, *Erie* applies to this class action regardless of whether federal jurisdiction is proper under ordinary diversity, interpleader, or both.[58]

C. Rule 23(e) Approval and Article III.

Federal Rule of Civil Procedure 23(e),[59] which requires that the dismissal or compromise of a class action be approved by a district court, triggers the inquiry into federal jurisdiction.

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[58] *See Griffin v. McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 1025-26, 85 L.Ed. 1481 (1941) (applying *Erie* and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) to federal statutory interpleader case); *Perkins State Bank v. Connolly*, 632 F.2d 1306, 1311 (5th Cir.1980) (stating that, with limited exceptions, "substantive state rules of d sion generally govern federal interpleader proceedings"); *Bluff Creek Oil Co. v. Green*, 257 F.2d 83, 85 (5th Cir.1958) (applying *Erie* after characterizing § 1335 interpleader action as "just another diversity suit"); *Williams v. McFerrin*, 242 F.2d 53, 55 (5th Cir.1957) (applying Louisiana conflict of laws principles to case, per *Klaxon*, because "interpleader comes under the diversity jurisdiction of the federal courts"); *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1320-21 (8th Cir.1991) (stating in *dictum* that *Klaxon* applies to suits brought under § 1335 "because the federal interpleader statute is merely a special brand of diversity jurisdiction") (citing *Griffin*, 313 U.S. at 503, 61 S.Ct. at 1025-26, and *Williams*, 242 F.2d at 55); 7 WRIGHT & MILLER § 1713 (1986) (stating that the *Erie* doctrine applies fully in both FED.R.CIV.P. 22 and § 1335 interpleader actions) (noting exceptions for certain procedural, remedial, and administrative matters--*e.g.*, pleading rules, the availability of injunctive relief, and attorneys' fees).

[59] This provision reads: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED.R.CIV.P. 23(E).

The act of approving--or disapproving--a class action settlement is an exercise of judicial power by a district court. [60]

Unlike a private settlement in an ordinary case, a class action settlement requires that a federal district court affirmatively exercise its adjudicative authority. Thus, a judicially approved federal class action settlement is a "judgment." [61] The underlying authority to enter such a judgment is, of course, expressly circumscribed by Article III, which limits the judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2.

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[60] *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir.1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, --- U.S. ----, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *see Evans v. Jeff D.*, 475 U.S. 717, 726-727, 106 S.Ct. 1531, 1536-1537, 89 L.Ed.2d 747 (1986) (referring to district court's rule 23(e) "power to approve or reject a [class action] settlement"); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 793 (3d Cir.) ("A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words 'adjudicating,' the value of claims arising from a mass tort.") (quoting with approval Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L.REV. 779, 835 (1985) (footnote omitted)), *cert. denied*, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

[61] *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 (11th Cir.1996) (referring to "judgment" approving class action settlement), *White v. National Football League*, 836 F.Supp. 1508, 1510-11 (D.Minn.1993) (describing and entering "judgment" approving class action settlement), *aff'd*, 41 F.3d 402, 406-07 (8th Cir.1994) (referring to "judgment decree" and "consent judgment" approving class action settlement), *cert. denied*, --- U.S. ----, 115 S.Ct. 2569, 132 L.Ed.2d 821 and cert. denied, --- U.S. ----, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); cf. *Matsushita*, --- U.S. at ---- - ----, 116 S.Ct. at 877-78 (treating class action settlement approved by state court as a state court judgment).

In approving the class action settlement, the district court purported to release--i.e., extinguish--all claims by class members based on Fibreboard's liability for its asbestos products. *See Ahearn*, 162 F.R.D. at 517 (stating that Fibreboard and the insurers would receive "total peace" in return for providing the global settlement monies). Because the court was exercising its Article III judicial power, it did not have the authority to release claims that did not constitute a valid case or controversy at the time it gave its approval.

There are cases either holding or suggesting that in a settlement, courts may release claims that they would lack "jurisdiction" to try. *See, e.g., Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 221 & nn. 39-40 (5th Cir.1981); *Epstein v. MCA, Inc.*, 50 F.3d 644, 661-64 (9th Cir.1995), rev'd on other grounds sub nom., *Matsushita Elec. Indus. Co. v. Epstein*, --- U.S. ----, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Matsushita*, --- U.S. at ----, ---- - ----, 116 S.Ct. at 877, 879-90. All of these cases, however, refer to dimensions of jurisdiction other than the case-or-controversy requirement. For example, many of them involved federal courts' approving the release of state-law claims, or state courts approving the release of exclusively federal claims. *See, e.g., Corrugated Container*, 643 F.2d at 221 & nn. 39-40; *Epstein*, 50 F.3d at 661-64; *Matsushita*, --- U.S. at ----, 116 S.Ct. at 877. None of these cases has advanced the radical proposition that a federal court, in approving a class action settlement--*i.e.*, in the exercise of its Article III jurisdiction--can release claims not presenting a case or controversy.

Furthermore, courts often have used the "common nucleus of operative facts" test to determine whether unpled claims can be released. *See, e.g., Class Plaintiffs v. City of*

Seattle, 955 F.2d 1268, 1288 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir.1991). This test is used for determining whether a court may exercise supplemental jurisdiction, and a federal court may exercise supplemental jurisdiction only over claims that are part of the same Article III case or controversy. *See* 28 U.S.C. § 1367(a) (1994); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

Thus, the release-of-claims cases assume that the released claims are justiciable cases or controversies. Those cases do not challenge the key conclusion that a portion of a settlement is void if it purports to release non-justiciable claims.

D. The Class.

The plaintiff class of natural persons certified in this case--the Global Health Claimant Class--is indeed sweeping. [62]

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[62]The precise class definition is as follows:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but

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By its terms, the class definition includes, *inter alia*, the following categories of persons:

(1) future children of persons exposed to asbestos ("future children");[63]

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[62](...continued)
not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraph (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

[63]The future children purportedly bring "indirect" claims--e.g., claims for wrongful death--derived from the exposure to asbestos of the persons who will become their parents. Some states treat these claims as non-derivative. *See Adams v. U.S. (In re "Agent Orange" Prod. Liab. Litig.)*, 818 F.2d 201, 203 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988). Most of these claims are also unripe because the person exposed to asbestos--the future parent of the future child--is still alive.

(2) future spouses of persons exposed to asbestos ("future spouses");[64] and

(3) persons who have been exposed to asbestos, who have not manifested an asbestos-related disease, and who had not filed or had dismissed a lawsuit by August 27, 1993 ("exposure-only" claimants).

No person included in the first two categories meets the irreducible constitutional minimum of standing for any claim. Furthermore, some of the persons in the third category lack standing with respect to some or all of their claims. Thus, several of the claims asserted by these categories of persons present no justiciable case or controversy, and the district court therefore erred in deciding to hear them. The future children, for example, include "persons" who had not been conceived at the time the complaint was filed. [65] Common sense alone dictates the conclusion that non-existent persons cannot have standing to assert *in personam* causes of action for money damages. In more formal terms, these unconceived plaintiffs cannot prove injury-in-fact and thus cannot establish standing to assert their *in personam* tort claims. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (defining injury-in-fact).

Similarly, future spouses--who may or may not already be born--are, by definition, not yet married to the exposed persons. Common sense once again dictates the conclusion that these persons--who have not been exposed to asbestos

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[64]The future spouses also purportedly bring indirect claims--e.g., loss of consortium. Again, some jurisdictions treat these claims as non- derivative. *See Adams*, 818 F.2d at 203.

[65]For simplicity, I restrict my analysis to persons not yet conceived.

themselves--have not yet been injured in fact because they currently have no relation to exposed persons.

Imagine, for example, the absurd hypothetical of a "person" from each of the first two categories filing individual lawsuits today in federal court--i.e., without resort to rule 23. I do not doubt that any federal court would dismiss their claims immediately for want of justiciability. We must not allow the aggregation of individual claims through the class action device to divert our attention from such a fatal defect.[66]

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[66]The rule 23(b)(3) class in the *Agent Orange* case was carefully defined to avoid future children and future spouses. The class definition read as follows:

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides.... The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Ivy v. Diamond Shamrock Chems. Co. (*In re "Agent Orange" Prod. Liab. Litig.*), 996 F.2d 1425, 1429 (2d Cir.1993) (quoting *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 100 F.R.D. 718, 729 (E.D.N.Y.1983), *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988)), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994). This definition restricted the class to past and present spouses and already-born children, thus avoiding the jurisdictional anomalies presented by future spouses and future children. The appellees would have us believe that the federal courts routinely certify classes including future claimants; the authorities they cite belie that claim, however. In *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 100 S.Ct. 1202, 1207, 63 L.Ed.2d 479 (1980), the class definition did include future claimants, but the district court had declined to certify the class; as a result, the Court never had occasion to consider the standing issues raised by the inclusion of such persons. Likewise, the district court in *Comer v. Cisneros*, 37 F.3d 775, 780, 796 (2d Cir.1994), had declined to certify a class

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Aside from these glaring defects, a more subtle problem exists with respect to the third category of persons that I defined above--i.e., the exposure-only claimants. Properly addressing the problem, however, requires a review of certain fundamental principles of Article III jurisdiction and their application to diversity cases.

E. *Standing.*

1. Standing in Relation to Causes of Action.

It is impossible to analyze standing without reference to a cause of action: "[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents." [67] Suppose, for example, that a public employer has

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[66](...continued)
including future claimants. Thus, the holding in *Comer* was merely that the purported class representatives--who were present claimants--had standing, not that the future claimants did.

Finally, *McArthur v. Scott*, 113 U.S. 340, 5 S.Ct. 652, 28 L.Ed. 1015 (1885), simply has nothing to do with this mass toxic tort class action. The portion of *McArthur* relied upon by the appellees discusses trusts and estates, as do the cases cited therein. *See id.* at 401-02, 5 S.Ct. at 673-74.

[67] *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134 (1991); *see Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C.Cir.1994) ("[A] plaintiff's standing must be analyzed with reference to the particular claim made."); *see also Financial Insts. Retirement Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir.1992) (quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

In *Louisiana Landmarks Soc'y v. City of New Orleans*, 85 F.3d 1119, 1122 n. 3 (5th Cir.1996), we stated that "[s]tanding is a concept distinct from the concept of private rights of action." The appellee in that case had failed to brief
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discriminated against an applicant for employment on the basis of race. Undoubtedly, such an allegation of injury would meet Article III's standing requirements for, e.g., a Fourteenth Amendment equal protection claim.

Nevertheless, that injury may not serve as the predicate for standing to assert any conceivable cause of action. For example, such an injury does not operate to confer standing on the applicant for a violation of the right to be free from unreasonable searches and seizures under the Fourth Amendment. For while he could show injury-in-fact with respect to his equal protection rights, he cannot show injury-in-fact with respect to his rights under the Fourth Amendment. See Lewis v. Casey, --- U.S. ----, ---- n. 6, 116 S.Ct. 2174, 2181-82 n. 6, 135 L.Ed.2d 606 (1996). [68]

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[67](...continued)
the implied cause of action issue raised by the appellants, asserting that the appellants had waived a "standing" argument in the district court. We expressed our puzzlement with the appellee's waiver argument by noting that standing and implied rights of action are not equivalent concepts and that, moreover, standing can never be waived, because it is jurisdictional. See id. Thus, *Landmarks* should not be read as implying that standing is unrelated to the causes of action alleged.

[68]The Court made this point explicitly:

> [S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which

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Thus, standing analysis assumes, at a minimum, that the plaintiff has alleged a cause of action created to vindicate a legally protected interest. The cause of action alleged serves as a necessary frame of reference for the standing inquiry--hence the Court's explicit connection of standing and causes of action in *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991):

> Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*"[69]

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[68](...continued)
he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982).

Casey, — U.S. at — n. 6, 116 S.Ct. at 2181-82 n. 6 (parallel citations omitted).

[69]500 U.S. at 77, 111 S.Ct. at 1704 (quoting *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984)) (emphasis in original); *see Catholic Social Serv.*, 12 F.3d at 1125; *Howe v. Ellenbecker*, 8 F.3d 1258, 1261 (8th Cir.1993), *cert. denied*, — U.S. —-,4 S.Ct. 1373, 128 L.Ed.2d 49 (1994); *Financial Insts.*, 964 F.2d at 146-47; *see also United Food & Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc.*, 50 F.3d 1426, 1428-29 (8th Cir.1995), *rev'd on other grounds*, — U.S. —-, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); *cf. Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir.1992) ("Where ... Congress is the source of the purportedly violated legal obligation, we look to the statute to define the injury.") (continued...)

In other words, standing analysis does not operate in a vacuum: The allegation of a cause of action frames the inquiry. *See Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C.Cir.1994). [70]

In diversity cases, pursuant to the Erie doctrine, state law defines the substantive causes of action. In an ordinary case, we rarely have to confront the interaction between Erie and federal standing analysis. Regardless of what else one can say about Ahearn, however, no one can fairly accuse it of being an ordinary case.

2. Injury-in-Fact.

In Lujan v. Defenders of Wildlife, the Supreme Court set out the test for Article III standing as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural or hypothetical.' " Second, there must be a causal

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[69](...continued)
(quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

[70]I do not suggest that we look to the merits of the cause of action or determine whether the cause of action is valid (in the sense of determining whether the plaintiff ultimately would win). Rather, we must examine the pleadings to determine what cause of action the plaintiff has alleged and whether his allegations of injury, in the context of that cause of action, satisfy Article III standards.

> connection between the injury and the conduct complained of--the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61, 112 S.Ct. at 2136 (footnote and citations omitted). For the purposes of this case, we need focus only on the first prong of this standard: injury-in-fact.

> The *Lujan* injury-in-fact test consists of two sections:
> (1) the "invasion of a legally protected interest"; and
> (2) the criteria of
> (a) concreteness and particularity; and
> (b) actuality or imminence.

The failure of a plaintiff fully to meet the requirements of both sections constitutes the failure to establish the irreducible constitutional minimum of standing. Thus, to survive the Article III inquiry, a plaintiff must make--*inter alia*--a showing that he had a legally protected interest that has been invaded. The failure to make such showing would be fatal to his attempt to establish Article

III Standing.

3. Effect of State Law.

The second part of the *Lujan* injury-in-fact test is governed purely by federal law (even in diversity cases), for no pronouncement of state law can affect a federal court's

determination of whether an invasion of a legally protected interest is, e.g., sufficiently concrete and particularized to satisfy Article III. Similarly, no decision of state law can affect a federal court's determination of whether such an invasion is sufficiently actual or imminent to satisfy Article III.

In diversity cases, however, the first part of the *Lujan* injury-in-fact test is not completely independent of state law. The concept of "invasion of a legally protected interest" immediately invites the question of who or what protects the interest. In an ordinary, non-diversity case, federal law is the source of substantive rights and of causes of action designed to vindicate those rights. In diversity cases, it is state law that creates legally protected interests and provides causes of action to vindicate them.

This conclusion cannot be avoided by chanting the mantra that federal law cannot depend on state law. Under *Erie*, the judgment of a federal court depends on state substantive law in a diversity case. The definition of a legally protected interest--as well as the provision of a cause of action to vindicate that interest--is a matter of substantive law. [71] If the

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[71] In a recent case interpreting the Warsaw Convention, the Supreme Court had occasion to consider whether the question of who may bring suit is substantive or procedural. *See Zicherman v. Korean Air Lines Co.*, --- U.S. ----, ----, 116 S.Ct. 629, 634, 133 L.Ed.2d 596 (1996). The Court was interpreting Article 24 of the Convention, which leaves to domestic law the issues of who is entitled to sue and what types of damages they may recover. *See id.* at ---- - ----, 116 S.Ct. at 633-34. The Court concluded:

> The most natural reading of [Article 24] is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.... It does not seem to us that the question of who is entitled to a damages award is procedural.

(continued...)

federal injury-in-fact test articulated in *Lujan* depends on the definition of a legally protected interest--and it does--then the outcome of that federal inquiry depends in part on how state law defines that interest.

Moreover, when a state has declined to create a given cause of action, it has decided not to accord legal protection to a particular interest. Therefore, if a given exposure-only cause of action embraced in the settlement is not founded on a substantive right, [72] it is impossible for a person asserting that claim to prove injury-in-fact. This is so because the injury-in-fact test requires proof of the invasion of a legally protected interest. *See Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136; *cf. International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704 (stating that substantive claim is a predicate for standing analysis). [73]

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[71](...continued)
Id. at ----, 116 S.Ct. at 634 (emphasis added). Thus, the question of who may bring suit is a question answered by substantive law--in a diversity case, state substantive law. This is not to say that standing in federal court is purely an issue of state law in a diversity case; rather, the role of state law is to identify, within federal constitutional limits, the persons who have legally protected interests and what those interests are.

[72]This is equivalent to saying that the law of the relevant state (determined through a choice of law analysis) does not authorize that exposure-only cause of action.

[73]Cases that opine in broad language that state law cannot affect the diversity jurisdiction of the federal courts are inapposite. *Cf., e.g., Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir.1982). In *Begay*, the court did opine that state law cannot create or enlarge federal jurisdiction, but that statement must be viewed in context.

The *Begay* court faced a state statute that granted a substantive right
(continued...)

4. Choice of Law Analysis.

The causes of action alleged in *Ahearn* are state-law causes of action brought on the basis of diversity jurisdiction. Standing must be measured by the cause of action pled, *see International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704; therefore, the standing of the exposure-only plaintiffs must be gauged by the causes of action they assert.

All of the exposure-only claimants have a common predicate for their causes of action: Their claims, by definition, are based on mere exposure to asbestos, not on an extant injury caused by exposure to asbestos. The states vary, however, in the degree to which they recognize a cause of action predicated on exposure alone--i.e., they vary in the degree to which they legally protect an interest in being free from exposure to asbestos.

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[73](...continued)
and then purported to state that the sole remedy for violation of the right was an administrative claim over which a state commission had exclusive jurisdiction. The court responded that a state law, having conferred a substantive right, cannot determine whether a federal court sitting in diversity has jurisdiction over a claim based on that right. *See id.* at 1315-17. Rather, the proper inquiry in such a case is whether the complaint stated a claim upon which relief could be granted. *See id.* at 1315, 1317, 1320.

This analysis does not apply to the Article III justiciability issues raised in *Ahearn*. The existence vel non of a cause of action is a factor that the Supreme Court has incorporated into the Article III standing inquiry. *See Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Reinforcing this approach is the unambiguous recognition by the Court that we are to measure standing according to the particular common-law, statutory, or constitutional claim asserted. *See International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704. Thus, in diversity cases, whether a state-law cause of action exists *at all* is a jurisdictional issue insofar as it relates to standing and injury-in-fact, not an issue of whether a claim for relief has been stated.

In Pennsylvania, for example, "asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action." *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 237 (1996). Pennsylvania does not recognize, in the absence of manifest injury, a legally protected interest either in (1) being free from the increased risk of cancer because of exposure to asbestos or in (2) being free from present emotional distress resulting from exposure to asbestos (i.e., distress caused by the fear of contracting cancer). *See id.* 674 A.2d at 237-38. [74] Consequently, because Pennsylvania does not legally protect those interests, a plaintiff asserting such causes of action could

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[74]Despite this unambiguous holding, the Supreme Court of Pennsylvania has allowed plaintiffs to recover medical monitoring costs for exposure to asbestos. *See Simmons*, 674 A.2d at 239-40. The court stated that such costs were properly awarded for meritorious exposure-only cases but that damages for increased risk and fear of cancer were not authorized. *See id.* 674 A.2d at 239-40.

There are two ways to analyze the phenomenon of exposure-only causes of action. First is the monolithic view--*i.e.*, that there is only a single cause of action based on exposure to asbestos, for which there are multiple remedies (some of which may not be available). Second is the "polylithic" view (for lack of a better word), that there are multiple causes of action for exposure to asbestos (some of which may not be available)--*i.e.*, there is one cause of action for increased risk of cancer, one cause of action for medical monitoring costs, etc.

It is largely irrelevant which of these two models is more elegant from a conceptual standpoint. What is important--indeed, determinative--for our inquiry is which of the two each state has adopted. Pennsylvania's high court unambiguously has held that Pennsylvania law supports no cause of action for increased risk of cancer or for present emotional distress arising from the fear of cancer. Thus, the court's statement about medical monitoring damages is best viewed as the authorization of a distinct cause of action for medical monitoring expenses. Reading the opinion otherwise would defy its plain language regarding Pennsylvania's nonrecognition of increased risk and emotional distress causes of action.

not possibly establish injury-in-fact under the standing test announced in *Lujan*--i.e., he cannot demonstrate the invasion of a legally protected interest.

States other than Pennsylvania also have declined to recognize all of the exposure-only causes of action embraced in the instant global settlement. [75] Such unauthorized claims are not founded upon legally protected interests. Thus, because those claims cannot properly be before an Article III court, they cannot be extinguished by the *Ahearn* global settlement. Therefore, because the global settlement purports to extinguish those claims, reversal or vacatur is required.

It was necessary to conduct a choice of law analysis to determine the answer to the threshold question of standing in this case. More specifically, the district court should have conducted the choice of law analysis to determine whether every class member alleged the invasion of a legally protected interest--per the *Lujan* injury-in-fact test--with respect to each claim they asserted. The failure to do so resulted in the district

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[75] *See, e.g., Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28, 29-31 (Ct.App. 1987) (holding that subclinical asbestos-related injury is not sufficient to support cause of action), *review dismissed*, 162 Ariz. 186, 781 P.2d 1373 (1989); *DeStories v. City of Phoenix*, 154 Ariz. 604, 744 P.2d 705, 707-11 (Ct.App.1987) (same); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del.1984) (holding that present physical injury caused by exposure to asbestos is "essential element" of claims for mental anguish and medical monitoring costs); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky.1994) (requiring manifestation of asbestos-caused injury before recognizing existence of cause of action for negligence based on exposure to asbestos); *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 2 (1986) (holding that cause of action for asbestosis accrues upon discovery of disease, not at time of exposure to asbestos); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900, 904-06 (1981) (holding that injury does not occur upon exposure to asbestos, but rather upon development of disease).

court's exercising its powers over claims not presenting a case or controversy--i.e., in the absence of Article III jurisdiction.[76]

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[76]The appellees cite a legion of cases indiscriminately--and in most cases without sufficient analysis--for the proposition that the exposure- only claims present a case or controversy. These cases, for one reason or another, are insufficient to overcome the force of *Lujan* and *International Primate*.

For example, the appellees cite *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), as an example of a case where the Supreme Court found exposure to a harmful substance a sufficient injury-in-fact for standing purposes. The plaintiffs sought a declaratory judgment that a federal statute capping liability for nuclear accidents had violated their constitutional rights. *See id.* at 67, 98 S.Ct. at 2627. Three justices wrote separate concurrences expressing their conclusions that the dispute in that case was not within the district court's jurisdiction. *See id.* at 94-103, 98 S.Ct. at 2641-46 (concurring opinions of Justice Stewart, then-Justice Rehnquist, and Justice Stevens). The majority's standing analysis appeared to focus on environmental and aesthetic injuries unconnected to the claims asserted by the plaintiffs, which were claims for violations of the Due Process and Takings Clauses of the Fifth Amendment. *Compare id.* at 69, 98 S.Ct. at 2628 (claims alleged in complaint) with id. at 72-74, 98 S.Ct. at 2629-31 (injuries alleged in complaint).

That methodology--analyzing injury unanchored by the substantive claim asserted--is no longer available to us in light of *Lujan* and *International Primate*. In fact, the analysis advanced by the *Duke Power* majority is logically inconsistent with the Supreme Court's modern standing framework, embodied primarily in *Lujan* and enhanced by the unanimous directive in *International Primate*. Given that irreconcilable inconsistency, we have no choice but to follow the Court's more recent pronouncements.

Helling v. McKinney, 509 U.S. 25, 28, 113 S.Ct. 2475, 2478, 125 L.Ed.2d 22 (1993)--a case not cited by the appellees--is not on point, because the plaintiff alleged *present* injuries based on exposure to an alleged toxin (second-hand tobacco smoke). *See also Georgine*, 83 F.3d at 636 (Wellford, J., concurring). As a result, the Supreme Court never reached the issue of standing based on mere exposure to a toxin.

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[76](...continued)

In Agent Orange, the Second Circuit did not mention either *Lujan* or *International Primate* in stating that the exposure-only plaintiffs had sustained an " 'injury in fact.' " *See Agent Orange*, 996 F.2d at 1434 (relying only on *Duke Power*). Although I admire the Second Circuit's handling of the massive Agent Orange litigation, I must respectfully disagree with its analysis that exposure-only claimants in that litigation met Article III's requirements. Other than *Duke Power*, the court appeared to rely only on cases involving the interpretation of the term "injury" in insurance policies. *See id.* These cases, however,are not authoritative with respect to the manner in which "injury-in-fact" is defined for Article III purposes. *But see id.* The Supreme Court's recent guidance in *Lujan*, on the other hand, is dispositive of that definitional issue.

The appellees cite several bankruptcy cases to support their exposure-only theory--*e.g.*, *In re UNR Indus.*, 20 F.3d 766, 770-71 (7th Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 509, 130 L.Ed.2d 416 (1994); *Findley v. Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 129 B.R. 710, 834-37 (E. & S.D.N.Y. and Bankr.S.D.N.Y.1991), *vacated*, 982 F.2d 721 (2d Cir.1992), modified on reh'g, 993 F.2d 7 (2d Cir.1993); *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 92-P-10000-S, Civ.A. No. CV94-P-11558-S, 1994 WL 114580, at *1 (N.D.Ala. Apr. 1, 1994). On its face Article III does not apply to bankruptcy courts, which Article I courts. *See Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 210 n. 18 (5th Cir.1994). Because of the statutory scheme requiring that matters be referred to bankruptcy courts by district courts, however, the jurisdiction of the bankruptcy courts may be limited by Article III. *See, e.g., In re Interpictures, Inc.*, 86 B.R. 24, 28-29 (Bankr.E.D.N.Y.1988); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW.U.L.REV. 1188, 1197-98 (1988).

If Article III does not apply to bankruptcy courts, the cited cases are plainly distinguishable. If it does apply, the reasoning of those cases is erroneous. The two district court cases do not cite to *Lujan* or *International Primate*. The Seventh Circuit's decision in *UNR* does cite to the former, but only in a conclusionary fashion and without any in-depth analysis.

The majority's failure to raise and address the Article III issues is directly contrary to *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), and *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). *In Guaranty Trust*, the Court faced the question of whether a state statute of limitations barring a class action was to be applied by a federal court sitting in diversity. *See Guaranty Trust*, 326 U.S. at 100-01, 65 S.Ct. at 1465-66. The Court expressly stated that *Erie* implicates the jurisdiction of Article III courts: "Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies." *Id.* at 101, 65 S.Ct. at 1466 (citation omitted).

Recognizing that the *Erie* doctrine "[i]nevitably" applies to suits in equity, the Court framed the issue presented as follows:

> Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity *when that court's jurisdiction is dependent on the fact that there is a State-created right*, or is such statute of "a mere remedial character" which a federal court may disregard?

Id. at 107-08, 65 S.Ct. at 1469 (citation omitted) (emphasis added). Thus, the Court explicitly recognized that the viability of a state- law cause of action was an essential predicate of diversity jurisdiction.

The Court's holding in *Guaranty Trust* was unambiguous:

> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Id. at 110, 65 S.Ct. at 1470. Thus, a state's decision to limit the life of a state-created cause of action must be respected by federal courts sitting in diversity. It is equally plain--indeed, it follows a *fortiori*-- that when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action.

In fact, we have interpreted a decision of the Supreme Court as specifically stating that federal courts sitting in diversity must not entertain diversity actions that are unavailable under state law. See *Kuchenig v. California Co.*, 350 F.2d 551, 556 (5th Cir.1965) (interpreting *Angel*), *cert. denied*, 382 U.S. 985, 86 S.Ct. 561, 15 L.Ed.2d 473 (1966). In deciding whether indispensability of a party was a matter governed by state or federal law in a diversity case, we applied an analysis in *Kuchenig* that closely parallels appropriate the *Erie*/standing analysis in *Ahearn.*

We first noted that "every court that has dealt with th[at] issue at all seems to have treated it, appropriately in our view, as a run-of-the-mine [sic] *Erie* problem, requiring the usual balancing of substantive and procedural elements." *Kuchenig,* 350 F.2d at 555. We stated further:

> [I]ndispensability, while not properly regarded as a jurisdictional issue, is closely related to jurisdiction, *and may act to defeat diversity*

> *jurisdiction* .... [R]ules of joinder depend on the substantive rights and liabilities of the parties, present and absent. In diversity actions, these substantive rights and liabilities are creatures of state law.

Id. at 555-56 (footnotes and citations omitted, emphasis added). We thus recognized an inevitable relationship, in diversity cases, between state substantive law and federal jurisdiction. We also noted that this relationship was not confrontational, but symbiotic: "Professor [Charles Alan] Wright characterizes the conflict in these cases as 'more apparent than real': state law determines the interests of the parties; federal law determines whether these state-created rights render a missing person indispensable." *Id.* at 556.[77]

This approach to indispensability of a party--a matter "closely related to jurisdiction" that "may act to defeat diversity jurisdiction," *id.* at 555-- parallels the approach I have applied above in relation to standing. State law determines the

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[77]Critically, we modified Professor Wright's apparent conflict formulation in one critical respect: "This short-hand formulation must at least be qualified insofar as it leaves room for a federal court to run afoul of *Angel v. Bullington* by entertaining diversity actions unavailable under state law." *Id.* (citation omitted). Professor Wright had acknowledged this limitation, referring to a prominent district judge's articulation of it: " 'Judge Wyzanski carefully points out the limitation that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right.' " *Id.* (quoting 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 511 (1964 pocket part) (Wright ed. 1961)).

substantive rights and interests of the exposure-only claimants. When a state has conferred a substantive right, federal law determines whether persons asserting such a right meet Article III requirements.

When a state has not conferred such a right, it is not within the power of a federal court to entertain that action in diversity. *See id.* at 556. The district court's diversity jurisdiction in this multi-state class action depended on the existence of state-created causes of action. *See Guaranty Trust,* 326 U.S. at 107-08, 65 S.Ct. at 1469 (stating that a federal court's diversity jurisdiction is "dependent on the fact that there is a State-created right"). In order to determine whether it had jurisdiction over all of the claims released in the class action settlement, the district court had to conduct a choice of law inquiry to determine which states' laws applied to which causes of action. Any claims not authorized by state law should have been explicitly excised from the settlement. The adjudication by the district court of those claims violated Article III limits on that court's jurisdiction.

Under these circumstances, we have no discretion: We must reverse or vacate the judgment approving the class action settlement. In reviewing the approval of a class action settlement, we may not modify the terms of the settlement but must approve or disapprove it in its entirety. *Cotton v. Hinton,* 559 F.2d 1326, 1331-32 (5th Cir.1977).

The reason for this rule is straightforward: Class action settlements often include delicate compromises, the disruption of which would lead one or more of the parties to reconsider the wisdom of the settlement. Therefore, if an appellate court negates part of a class action settlement-- e.g., because of justiciability problems--it would have to vacate or reverse and

remand for further proceedings. It could not simply excise the objectionable portion of the settlement and uphold the remainder as a viable settlement. *See id.*

IX. Summary and Conclusion.

Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment.

The *only* protection accorded the class was a rule 23(e) fairness hearing. The district court also appointed a guardian *ad litem* to represent absent class members, but he did so only after class and defense counsel had completed the settlement. Thus, class members received absolutely no structural or procedural protections; instead, they had to rely on an after-the-fact review of the settlement's substance.

The district court and the guardian *ad litem* undertook that task diligently, but an after-the-fact substantive review is far too little, far too late. The court cannot conduct a trial in order to avoid one; nor can it turn back the clock and appoint different counsel to renegotiate the settlement fairly. Thus, the extent to which class counsel's numerous conflicts and Fibreboard's stacking of the deck actually affected the final settlement is unknowable. As Fibreboard entered the negotiations in constructive bankruptcy and left with more than ninety-five percent of its assets intact, however, there is reason to be skeptical.

The effect of replacing the tort system with an administrative processing center is equally hard to ascertain, for

judges lack legislative fact-finding and investigative capabilities. *If* the trust proves to be funded adequately and managed fairly, it *might* process claims more efficiently than the courts, reducing transaction costs and providing plaintiffs with faster and more reliable recovery. As such a reduction in transaction costs would generate a surplus for Fibreboard and the class, Fibreboard *might* deserve to walk away with over $200 million in remaining assets.

On the other hand, the trust might attempt to impose arbitrary limits similar to those of the *Georgine* trust and stonewall plaintiffs' counsel who protest, forcing them to endure a tedious series of procedural delays before their clients finally receive a day in court. The trust might also be inadequately funded, as was the Dow Corning settlement, leaving plaintiffs scraping for what little they can get while bureaucrats struggle to hold on to their jobs.

In short, we simply do not know what the courts have wrought. What we do know is that this "reform" involves denial of established constitutional rights; relaxation of already lax ethical rules; extinguishing of claims that we have no power to adjudicate, much less abolish; and a significant likelihood of collusion between the defendant and the class counsel.

I respectfully dissent from the majority's refusal to reverse--or veto--certification of this no-opt-out, mass-tort, settlement-only, futures-only class action.

APPENDIX C

Gerald **AHEARN**, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, on Behalf of Themselves and Others Similarly Situated, Plaintiffs,

V.

FIBREBOARD CORPORATION and Bethlehem Steel Corporation, Defendants, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company, Defendant-Intervenors. Owens-Illinois, Inc. on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant. Civ. A. No. 6:93cv526., United States District Court, E.D. Texas, Tyler Division. July 27, 1995.

ROBERT M. PARKER, Circuit Judge.

This action was filed to obtain judicial approval of a class settlement (the "Global Settlement") which, if finally approved, will resolve all future [1] asbestos-related personal injury claims against Fibreboard Corporation ("Fibreboard"), and a longstanding dispute between Fibreboard and two of its insurers, Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") (Continental and Pacific

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[1]Throughout this opinion, a "future claim" means a claim by a Global Health Claimant Class member covered by the Global Settlement Agreement. The Global Health Claimant Class essentially consists of all persons having a claim arising out of exposure to asbestos or asbestos-containing products for which Fibreboard may bear legal liability, where that exposure occurred prior to August 27, 1993, and where the claim had not been filed as a lawsuit or settled as of August 27, 1993. The precise class definition is set out in detail in the Judgment Regarding Class Certification.

are sometimes referred to collectively as the "Insurers") regarding the scope and extent of its insurance coverage available to Fibreboard to cover its asbestos liabilities. The agreements now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. The principal parties to this litigation are the following: Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class," or the "Class"); Fibreboard, which manufactured and distributed asbestos-containing products, principally asbestos insulation, from the 1920s until 1971; Continental, CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard; Pacific, which Fibreboard alleges issued it a general liability policy; Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant class of third-party claimants (the "Global Third-Party Claimant Class"); Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class"); Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Intervenors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement; and James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

OVERVIEW

This action is the latest installment in the continuing saga of asbestos- related personal injury litigation against Fibreboard. If the Global Settlement is finally approved, it will be the last. The parties to the Global Settlement (the "Settling Parties") agreed to the settlement because each found the Global Settlement preferable to the alternatives. Under the Global Settlement, Fibreboard will survive with its assets intact; the Global Health Claimant Class members will be better compensated than if Fibreboard were bled dry in the tort system; and the Insurers will rid themselves once and for all of a potentially ruinous liability. The only real loser under the Global Settlement is the asbestos litigation industry--the army of lawyers, consultants, and experts of every stripe--which has historically consumed the lion's share of the funds expended by asbestos defendants and their insurers in dealing with their asbestos liabilities. [2]

Without the Global Settlement, Fibreboard's chances of survival range from fair to nil, depending on the outcome of its insurance dispute. All Global Health Claimant Class Members, but especially those whose claims mature far in the future and those who were first exposed to Fibreboard's asbestos-containing products after 1959, face a serious risk of receiving

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[2] The Asbestos Litigation Industry was not without a voice in these proceedings. The Jaques firm, which represents the Flanagan Intervenors, purports to have an inventory of thousands of unfiled claims which allegedly would be affected by approval of the Global Settlement to the detriment of the firm. One of that firm's primary objections to the Global Settlement is that it would limit attorneys' fees to 25% of a claimant's recovery under the Global Settlement rather than a higher contractual contingent fee.

little or no compensation from Fibreboard without the settlement. The prerequisites of Rule 23(a) have been met. Mandatory class treatment is proper under the plain language of Rule 23(b)(1)(B). The only real obstacle the Global Settlement faces is its relative novelty. It remains to be seen whether Rule 23 will finally be determined to be flexible enough to embrace such a case. Put another way, the primary question presented by this case is whether the courts can provide a forum wherein a business plagued with continuing mass tort liability can negotiate a fair and final resolution the problem, or whether the courts' competence is limited to parceling out the corpse in bankruptcy.

BACKGROUND AND SETTLEMENT NEGOTIATIONS

A. Asbestos Litigation

Generally Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified. Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically.

Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously consideredto be immune from financial difficulty. See In re Asbestos Products Liability Litigation, 771 F.Supp. 415, 420 (J.P.M.L.1991). Beginning in 1982 with Unarco Industries, Inc. and Johns-Manville, Inc. the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle- Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc.

As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their claims resolved. Transaction costs outpaced compensation to victims. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

By 1990, the situation had reached critical proportions. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the

MDL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore ... national disposition techniques such as classes and sub- classes under Rule 23."

In March 1991, the Asbestos Ad Hoc Committee issued its report. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See Georgine v. Amchem Prods., 157 F.R.D. 246, 265 (E.D.Pa.1994). The Asbestos Ad Hoc Committee stated: "[T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 2 (1991). The Asbestos Ad Hoc Committee also expressed its hope that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. Id. at 14. It concluded that: "The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases." Id. at 10

On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings. In re Asbestos Products Liability Litigation, 771 F.Supp. 415. The MDL Panel voiced its hope that the MDL transfer might foster

global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible." Id. at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims were pending in the federal courts, with two times that number pending in the state courts. Id. at 416, 421.

After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder, [3] counsel for Fibreboard, as a member of the Defendants' Steering Committee. One of the tasks of the steering committee was to attempt to solve the asbestos crisis on a global basis.

Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative resolution mechanism for asbestos

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[3]Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases.

claims. Judge Weiner encouraged these global settlement negotiations. The talks did not produce a national settlement, but they did bear fruit. Judge Weiner's unrelenting efforts have resulted in many thousands of claims being settled against some but not all defendants, and they served as a springboard for the subsequent negotiations that eventually led to the settlement of this case. Judge Weiner's efforts also greatly aided the negotiations that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See Georgine, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements.

B. Fibreboard Background

Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on Manville to bear the brunt of the defense of cases. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary.

Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint

representation in asbestos-related personal injury litigation. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers--but not with Continental or Pacific--in order to enter the ACF. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged.

When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company, totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending

litigation. When it left the ACF, Fibreboard did not have enough cash to pay settlements of asbestos injury cases and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF.

C. Fibreboard's Insurance Coverage Dispute

Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit and a $500,000 per claim limit. Pacific was alleged to have issued a similar policy to Fibreboard in May 1956.

Since 1979, Fibreboard has been engaged in litigation with Continental and Pacific as to whether Fibreboard is entitled to be defended and indemnified under those policies with respect to asbestos-related personal injury, wrongful death, and related claims. In the early 1980s, Fibreboard's action against Continental and Pacific was consolidated with other similar actions in California. Fibreboard's insurance coverage litigation, came to be captioned, In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case")

The Coverage Case was tried in several phases. The trial was one of the largest and most complex proceedings in the

history of American civil jurisprudence, involving numerous insureds and insurers. At stake for Fibreboard and the insurers was the question of whether Fibreboard would be determined to have no further insurance coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

The trial court determined that any exposure to Fibreboard's asbestos products during the policy period triggered coverage; that once coverage was triggered, the insurer was liable for the full amount of the damages recovered by the claimant, subject to the per occurrence and per claim limits; and that each claim was a separate "occurrence." The court also ruled that insurers could seek equitable contribution from one another, but not from Fibreboard.

The insurers, including Continental and Pacific, appealed the trial court's decision in the Coverage Case, and the appeals were consolidated. Oral argument was conducted in several phases during the Summer of 1993, with the last phase completed on August 27. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment. However, the Court of Appeal simultaneously granted a joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage; [4] (ii) scope of coverage; (iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues--trigger of coverage and scope of coverage--involve both the Continental and Pacific policies. Two issues--number of occurrences and double anchor--involve only the Continental policy. The lost policy issue involves only the Pacific policy. A loss on any one of these issues could substantially impair, if not totally eliminate, Fibreboard's ability to pay future claims. Two expert witnesses, former California Supreme Court Justice Marcus M. Kaufman and Yale University Law Professor George Priest, testified at the fairness hearing with respect to the issue of the risk--viewed both as of August 27, 1993 and today--that Fibreboard would lose the Coverage Case pending in the California appellate courts. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on

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[4]The California Supreme Court recently determined that a continuous trigger applies in third-party general liability policies. The court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 10 Cal.4th 645, 676 n. 16, 42 Cal.Rptr.2d 324, 341 n. 16, 897 P.2d 1, 18 n. 16 (1995).

one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims. It was also their opinion that the same risk exists today. No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

D. Fibreboard and the Insurers

Following the dissolution of the ACF, Fibreboard found itself with large potential asbestos liabilities, about $100 million in cash from settlements of its AIG and Home Insurance policies, and the disputed Continental and Pacific policies. Fibreboard approached the asbestos Plaintiff's bar and explained its situation. The "Structured Settlement Program" ("SSP") was the result. Under the SSP, Fibreboard agreed to settle pre-1959 claims for 40% cash, with the remainder to be paid on September 1, 1993, which deadline could be extended if the Coverage Case was not by then resolved, until September 1, 1996. Fibreboard also agreed to conserve its corporate assets, and it agreed that if it lost the Coverage Case, all of the companies assets would be turned over to the plaintiffs. The SSP was offered nationwide, and was generally accepted by plaintiffs' counsel, but higher settlement values were demanded to compensate for the risk that the deferred portion of the settlement would never be paid if Fibreboard lost the Coverage Case.

In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement."

Continental agreed to fund the 40% cash portion of SSP settlements, which amount was to be reimbursed if Continental won the Coverage Case, Continental agreed to fund Fibreboard's defense, up to annual limits or "caps" of $25 million to $29 million per year, and Continental and Fibreboard agreed to cooperate in the management of pre-1959 claims.

The SSP did not solve Fibreboard's settlement problems. Many plaintiffs going to trial against other defendants often took Fibreboard to trial as well rather than attempt to deal with credit and set-off problems created by the SSP. As a result, Fibreboard became a defendant in a number of large consolidated trials which generated substantial defense costs for Fibreboard. Furthermore, Fibreboard's attempts to bring settlement values back to pre-ACF levels proved costly. In 1988 and 1989, Fibreboard's defense costs were almost twice the value of its negotiated settlements. In 1990, defense costs were $52 million, as compared to the $45 million nominal value in negotiated settlements. By June 1990, Fibreboard reached its annual defense cap under the Interim Agreement, and Continental therefore declined to pay Fibreboard's defense costs incurred thereafter in 1990.

In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate a complete settlement of the policies. Continental declined the proposal. Fibreboard and Pacific pursued the negotiations.

Because Fibreboard had no insurance coverage for post-1959 claims, and because all claims covered under the Pacific policy were also covered under the Continental policy,

Fibreboard entered into separate settlement negotiations with Pacific beginning in 1990 and culminating 1992. Under the resulting agreement (the "Pacific II Agreement"), Pacific would pay Fibreboard a maximum of $360 million to cover post-1959 claims, the final amount depending on the outcome of the coverage litigation and Fibreboard obtaining an order determining that Continental would have no further rights against Pacific for any asbestos-related defense or indemnity.

By 1991, Fibreboard was feeling intense pressure to initiate a new settlement program. It was facing major consolidated trials in Texas, Mississippi and Baltimore, and it had exhausted its defense monies under the Interim Agreement's defense caps. In order to shift some of the pressure to Continental, Fibreboard initiated its assignment settlement program. Under that program, Fibreboard paid no cash for pre-1959 claims, but assigned its rights to the proceeds under the Continental policy, together with any bad faith claims. Fibreboard agreed to preserve its net worth and corporate assets, and agreed that if it lost the Coverage Case, it would be responsible to pay the entire settlement amounts. Under the assignment settlement program, Fibreboard typically settled a law firm's entire inventory of cases, with a settlement average of over $11,400 per case, more than twice the $5,400 average under the 40% cash SSP.

Continental objected that the assignment settlements breached the Interim Agreement provisions calling for joint management of cases and claim-by-claim evaluation of cases, that the settlements violated policy provisions prohibiting assignment of policy rights, and that the settlement amounts were inflated, and that the pre-1959 claims were assigned a

disproportionately high share of the gross settlement amount in each office-wide settlement agreement. Fibreboard filed a number of lawsuits to test whether it's assignments were valid, and in June 1992, Fibreboard was granted summary adjudication in the Superior Court in Alameda County, California in a case known as Andrus v. Fibreboard Corp. The California Court of Appeal summarily rejected Continental's Writ of Mandate, and judgment in Andrus was entered in Fibreboard's favor in September 1992. [5] In July 1992, Continental wrote to Fibreboard and stated that it would provide a defense notwithstanding the defense caps in the interim agreement. Fibreboard determined that it would continue the assignment settlement program as long as Continental continued to reserve its coverage position.

E. Global Settlement Negotiations

In 1990, the Federal Judicial Center convened a conference of judges, academics and counsel to address the continuing issues related to asbestos litigation. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps toward national action on the asbestos problem. A number of federal judges organized to

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[5]The decision of the Alameda County Superior Court in the Andrus case was eventually reversed on appeal. The California Court of Appeal ruled in Fibreboard Corporation v. Continental Casualty Corp., No. A059716 (Cal.Ct.App. Oct. 19, 1994), that Fibreboard did not have the right to enter into assignment settlement agreements. On January 4, 1995, the California Supreme Court denied Fibreboard's petition for review, and the decision of the Court of Appeal is now final.

explore class action treatment of the problem. In July 1990, some members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed.R.Civ.P. 23(b)(1)(B), Linscomb v. Pittsburgh Corning Corp., et al., Civil Action No. 1:90cv5000 (E.D.Tex.). The action was commenced on behalf of all persons (present and future) with asbestos-related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be found.

Fibreboard approached Mr. Motley to discuss a global settlement because Mr. Motley had been outspoken about the need for alternative approaches to asbestos litigation, and because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any settlement. Mr. Motley, along with his partner at Ness Motley, Mr. Rice, agreed to consider global settlement negotiations on an assignment basis.

Fibreboard also approached Steven Kazan and Harry Wartnick in late 1990 or early 1991. Mr. Kazan and Mr. Wartnick were selected because they had the most information about Fibreboard's West Coast activity, and the plaintiffs' bar looked to them for guidance in Fibreboard litigation.

Having decided to pursue global negotiations, the Ness Motley lawyers, Mr. Kazan and Mr. Wartnick ("Plaintiffs' Counsel") [6] retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise.

Fibreboard supplied Plaintiff's Counsel with information about its past claims experiences, historical settlement averages, and financial information, on a confidential basis. Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years of asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos. Plaintiffs' Counsel also retained experts to provide an estimated value for Fibreboard absent its asbestos liabilities and to project future asbestos claims against Fibreboard.

Armed with this information, Plaintiffs' Counsel set out to settle the post-1959 claims, which would be Fibreboard's

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[6] Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

responsibility, to use as a benchmark for assignment settlement of the pre-1959 claims. In November 1991, it appeared that the parties had agreed to price terms of $278 million for post-1959 cases, and $1.86 billion for pre-1959 cases, but negotiations broke down over questions of opt-out rights and contribution and indemnity.

Continental had been kept informed of the settlement negotiations and had attempted to participate, but Plaintiffs' Counsel insisted on negotiating only with Fibreboard as long as there was a coverage dispute. In March 1992, Continental proposed a settlement of just the pre-1959 cases, but Fibreboard objected to any settlement that addressed only part of the company's asbestos litigation problem.

With global negotiations stalled, Fibreboard began negotiating with Ness Motley. An agreement was signed in December 1992, now known as the "Initial Ness Motley Agreement."

The Initial Ness Motley Agreement covered approximately 20,000 cases of Ness Motley and associated firms across the country, with provisions to add more cases. The average price per claim under the initial Ness Motley Agreement was $13,000, with post-1959 claims to be funded through the Pacific II settlement, and pre-1959 claims to be settled on an assignment basis. The Initial Ness Motley Agreement required that Fibreboard obtain either Continental's consent to the assignment or a court order approving the assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, Fibreboard Corp. v. Continental Casualty Co., Civil Action No.

6:93cv11 (E.D.Tex.), seeking: (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Such a bar order was simultaneously sought by Fibreboard against Continental in state court in Alameda County, California.

In February 1993 Continental's parent, CNA Financial Corporation, announced that Continental was ready to discuss a global settlement with Fibreboard. A status conference was held before this Court on March 10, 1993, at which representatives of Fibreboard, Continental and Ness Motley were present. The Court and the parties discussed the possible appointment of a Settlement Facilitator, and on March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in connection with the litigation pending in this Court between Fibreboard and Continental.

The parties set out the status of the matter and the parties' respective positions for Judge Higginbotham, and after hard-fought negotiations arrived at an agreement on April 9, 1993 (the "April 9 Agreement"). The April 9 Agreement provided, inter alia, that the parties would use their best efforts to achieve a global resolution of all of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos personal injury claims. In the negotiations leading up to the April 9 Agreement, Continental

took the position that any global settlement with Fibreboard had to be structured as a non-opt-out class action. For Fibreboard, the sine qua non was that any settlement be funded within Fibreboard's available insurance resources. Pacific had not participated in the negotiations leading up to the April 9 Agreement because it considered the Pacific II Agreement to be binding. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and after having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Continental's rights to equitable contribution against Pacific were unaffected by the Pacific II Agreement. Continental Casualty Co. v. Pacific Indemnity Co. and Fibreboard Corp., Civil Action No. 6:93cv 223 (E.D.Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement.

Negotiations continued on an on and off basis, sometimes under Judge Higginbotham's supervision and sometimes independently. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Continental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering both present and future cases appeared too complex to negotiate. Accordingly, he suggested that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases-- which could serve as the model for settling the presently pending Fibreboard cases--should precede further global negotiations.

With the continued active assistance of Judge Higginbotham, and after hard- fought, arm's-length negotiations,

on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related personal injury claims against Fibreboard. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval.

After the conclusion of the SubThrstitute Ness Motley Agreement, Judge Higginbotham addressed a letter to this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." By statement on the record on August 9, and a formal order of August 11, 1993, this Court appointed Plaintiffs' Counsel to act as negotiatingcounsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Judge Higginbotham continued to serve as Settlement Facilitator.

Negotiations continued, and on August 22, 1993, Continental and Pacific reached an agreement, subject to

approval of their respective boards of directors, with respect to equitable contribution rights. Under that agreement, Pacific agreed to share with Continental the costs of funding a global settlement, with Continental funding 65% and Pacific funding the remaining 35%. Global settlement negotiations continued, and on August 22, 1993, Plaintiffs' Counsel rejected Continental's $1.3 billion offer to settle all future claims. On the night of August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Plaintiffs' Counsel rejected the offer and negotiations broke off.

The parties agreed to make one final attempt to settle before the submission of the Coverage Case appeal on August 27, 1993. The parties convened in Tyler, Texas on Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. After several hours of negotiations, Continental's counsel agreed to recommend to Continental an increase of $25 million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached.

Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $10 million

contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute.

Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the Coverage Case that would become operative if for any reason a global settlement failed to achieve final court approval. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the Coverage Case while a global settlement was pending approval in the courts. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement. This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement, and, late in the afternoon of August 27, 1993, Fibreboard acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. The backup settlement is what is now referred to as the "Trilateral Settlement."

During the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the Coverage Case appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27--after this Court advised the parties that it would soon close for business--was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement").

F. The Global Settlement Agreement

The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than January 1, 1994. In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve-- either through litigation or settlement--the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 27, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount--not as of then determined--would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust.

In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all information-- including information that would otherwise be protected by privilege or trade secret confidentiality--as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the settlement amount, which fees would not be paid out of the Trust's funds.

As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement, Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and providing funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved.

G. The Trilateral Settlement Agreement

On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Hard-fought and contentious negotiations finally yielded an agreement whereby the Insurers would pay a total of $2 billion as a complete resolution of all liabilities under the policies: in effect, a complete policy buyout.

The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement, were described to this Court on September 9. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. This Court thereafter granted the motions for provisional class certification and for a temporary restraining order.

Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the "Trilateral Settlement Agreement") on October 12, 1993. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global agreement

in principle had been put on the record on August 27, 1993, numerous detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In addition, the "Third-Party Claimant Class Settlement" was negotiated during this time period. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement" and now referred to as the "Third-Party Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993.

KEY SETTLEMENT TERMS

There are four settlement agreements before the Court for approval: the Global Settlement, the Global Third-Party Claimant Class Settlement, the Trilateral Settlement, and the Longshore Settlement. The Global Settlement is intended to settle all future asbestos-related personal injury claims against Fibreboard and its Insurers. In order to accomplish one of the primary goals of the Global Settlement--to get Fibreboard and the insurers out of the asbestos litigation business--some mechanism had to be developed for dealing with contribution and indemnity claims arising out of Global Health Claimant Class member claims against other asbestos defendants. The Global Third-Party Claimant Class Settlement addresses these issues. The Trilateral Settlement, which was negotiated as a back-up to the Global Settlement, is essentially a buy-out of the Continental and Pacific policies, which would provide Fibreboard with a $2 billion fund to settle or defend present and future asbestos claims against it. The Longshore Settlement was

negotiated to foreclose the possibility that the Global Settlement might adversely affect the rights of Global Health Claimant Class members who are covered by the Longshore and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. s 901, et seq.

A. The Global Settlement

The Global Settlement settles all claims for asbestos-related personal injury or death against Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class, and provides a structure for the handling of the proceeds of the $1.525 billion Coverage Case settlement and the additional $10 million to be contributed by Fibreboard. In addition, the Global Settlement Agreement discharges the Insurers from any obligations in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except for obligations specifically assumed or preserved in the various agreements between them.

The purposes of the Global Settlement Agreement are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid

first; and (v) to protect the Trust's assets from unduly risky investments.

Under the Global Settlement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos- related personal injury or death claim, and all such claims will be directed to a Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). In order to receive compensation, claimants must first seek to settle with the Trust. If a settlement cannot be reached, the next step is mediation and then arbitration. If an acceptable resolution still cannot be reached, the claimant may then try the claim in the tort system, subject to the overall limit of $500,000 per claim. [7] Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten. The TDP contains certain spendthrift provisions that limit the proportion of the Trust's assets that can be paid out in any given year to ensure that funds will be available to claimants who assert claims against the Trust years into the future. If funds prove insufficient in any given year to pay all claimants, claimants suffering from more serious diseases are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first.

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[7] Punitive damages and prejudgment interest are not available to any claimant against the Trust.

B. The Third-Party Claimant Class Settlement

The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third- Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third- Party Claims are obtained.[8]

To this end, a settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representative of the Global

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[8]The Global Settlement Agreement contains provisions that deal with the possibility of the Court being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-Party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment. In response to objections from two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, the Settling Parties agreed that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction. The Global Settlement Agreement was therefore amended to provide that Global Health Claimant Class members will reduce judgments in their favor against such entities in such amounts as may be necessary to extinguish any such Global Third-Party Claims under applicable law.

Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement Agreement. The Third- Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific.

The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgment shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP. Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgment against a Global Third-Party Claimant Class member, the class member receives a reduction of any judgment subsequently entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. Second, where a personal injury claimant exhausts the Trust process and litigates against the Trust in the tort system, and also files suit against a Global Third-Party Claimant Class member, the class member likewise receives a judgment

reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust. [9]

The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from

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[9]There is one exception: if the class member were not satisfied with the Trust's offer, it--unlike a personal injury claimant against the Trust--would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.

settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers.

The Third-Party Claimant Class Settlement provides a substantial benefit to Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

In addition, the Third-Party Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred in the Manville proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative.

The Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. These negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as Georgine and Manville.

The overwhelming credible testimony demonstrates that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

The Trilateral Settlement Agreement, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (except for obligations that an Insurer has specifically assumed or preserved under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack.

If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly

or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries-- not only claims not filed or settled prior to August 27, 1993, but also asbestos-related personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims.

The Trilateral Settlement was the result of hard fought, arm's-length negotiations between Fibreboard and Continental. The negotiations leading to the Trilateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court is satisfied that the Trilateral Settlement is fair and reasonable.

D. The Longshore Settlement

On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. ss 901, et seq., and related statutes.

LHWCA provides that if a person entitled to compensation under LHWCA settles a claim against a third-party for which he or she would be entitled to receive Longshore benefits for less than the LHWCA compensation, the employer is liable for compensation only if the person entitled to benefits first obtained approval of the settlement from the employer and the employer's insurance carrier. 33 U.S.C. s 933(g)(1). If the person entitled to compensation obtains a judgment or settles a claim for more than the LHWCA compensation, the person entitled to benefits is required to notify the Longshore Employer of the judgment or settlement. 33 U.S.C. s 933(g)(2). Failure to comply with s 933(g)(2)'s notice requirements terminates the employer's obligation to pay Longshore benefits.

Plaintiffs' Counsel, the Secretary of Labor, and certain intervenors with potential LHWCA claims were concerned that Longshore employers might assert that the Global Settlement and related judgment constitute either a settlement under s 933(g)(1) or (g)(2) or a judgment under s 933(g)(2) for which the applicable notice or pre-approval requirements had not been satisfied.

Bethlehem agreed to serve as a representative of a class of Longshore employers. Bethlehem consulted with other Longshore employers during the course of negotiations, and eventually a settlement was reached between Bethlehem and the settling parties in which it was agreed that the final approval of the Global Settlement would not constitute a "settlement" under 33 U.S.C. s 933(g) which would operate to create a forfeiture of LHWCA compensation rights by Global Health Claimant Class members against the Longshore Defendant Class and that

Longshore Defendant Class members would have the right (i) to obtain liens or credits; (ii) to receive notice and an opportunity to approve settlements; and (iii) to be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust.

On February 2, 1995, the Court conducted a hearing on the fairness of the Longshore Settlement. No Longshore Defendant Class member or Global Health Claimant Class member appeared at the hearing to voice objections to the settlement, and no Longshore Defendant Class member filed written objections to the settlement. The Longshore Settlement clears a potential obstacle to final approval to the Global Settlement, which in turn potentially reduces the net obligations of members of the Longshore Defendant Class to members of the Global Health Claimant Class. The Court finds the Longshore Settlement to be fair and reasonable.

JURISDICTION

This Court has subject matter jurisdiction over these proceedings pursuant to 28 U.S.C. s 1332. Diversity of citizenship is present and is uncontested, but the Ortiz Intervenors contend that s 1332's amount-in-controversy requirement is not satisfied.

For diversity jurisdiction to exist, the amount-in-controversy requirement-- allegations of damage in excess of $50,000--must be satisfied. 28 U.S.C. s 1332(a).

In determining the amount in controversy, "the sum claimed by the plaintiff controls ... [unless it] appear[s] to a legal

certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938). Although the plaintiffs bear the burden of proving the requisite amount in controversy, the burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See Seafoam, Inc. v. Barrier Systems, Inc., 830 F.2d 62, 66 (5th Cir.1987). In determining the amount in controversy, claims for punitive damages must be included in the computation. See Bell v. Preferred Life Assurance Soc., 320 U.S. 238, 240, 64 S.Ct. 5, 6, 88 L.Ed. 15 (1943).

The amount-in-controversy requirement is satisfied because each Class member could lawfully allege damages in excess of $50,000. The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., In re Joint E. & S. Dist. Asbestos Litigation ("Manville"), 982 F.2d 721, 734 (asbestos: amount-in-controversy requirement satisfied although some members were "exposure only"); Carlough v. Amchem Prods. Inc., 834 F.Supp. 1437, 1456-62 (E.D.Pa.1993) (asbestos: same); In re A.H. Robins Co., 880 F.2d 709, 725 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an injury), cert. denied, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425, 1434 (2d Cir.1993) (Agent Orange), cert. denied, --- U.S. ----, 114 S.Ct.

1125, 127 L.Ed.2d 434 (1994). Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, inter alia, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., Potter v. Firestone Tire and Rubber Co., 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 570-71, 863 P.2d 795, 816 (1993); Miranda v. Shell Oil Co., 17 Cal.App.4th 1651, 26 Cal.Rptr.2d 655 (1993); Barras v. Monsanto Co., 831 S.W.2d 859 (Tex.App.--Houston [14 Dist.] 1992, writ denied). Fibreboard's headquarters are located in California, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

Furthermore even if some class members could not allege damages in excess of $50,000, the Court would still have jurisdiction because all the Class representatives could lawfully allege damages in excess of $50,000. In a class action, so long as the class representatives meet the amount-in- controversy requirement, all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. Moores Federal Practice, P 0.97, at 928 (2d ed. 1994); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, s 6.11, at 6-48 (3d ed. 1992).

CLASS ACTION PREREQUISITES

A. Rule 23(a) Prerequisites

Rule 23(a) lists four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 471-72 (5th Cir.1986).

Rule 23 requirements apply to all federal class actions; however, a number of courts have held that they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See In re A.H. Robins Co., 85 B.R. 373, 378 (E.D.Va.1988), aff'd, 880 F.2d 709 (4th Cir.1989); Officers for Justice v. Civil Service Comm'n of City and County of San Francisco, 688 F.2d 615, 633 (9th Cir.1982), cert. denied, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543 (11th Cir.1987); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 158 (S.D.Ohio 1992), appeal dismissed without op., 995 F.2d 1066 (6th Cir.1993); see also 2 Newberg on Class Actions s 11.28 (3rd ed. 1992). Courts have approved settlements and finally certified settlement classes while at the same time holding that

class certification for litigation purposes might be improper. See, e.g., Officers for Justice, 688 F.2d at 633; In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707, 713-14 (M.D.Pa.1978) (court approved class settlement while noting that certification for litigation purposes would be doubtful), aff'd in part without op. and vacated in part without op. sub nom. Colonial Fuel Co. v. Blue Coal Corp., 612 F.2d 571 (3d Cir.1979) (table); Wilkes-Barre Steam Heat Co. v. Blue Coal Corp., 612 F.2d 576 (3d Cir.1979) (table). Other Courts have held that Rule 23 prerequisites may not be relaxed merely because a settlement class is involved rather than a litigation class. See In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 799 (3rd Cir.1995). This Court approaches the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context.

Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

The numerosity requirement of Rule 23(a) is obviously satisfied. With Class membership numbering in the hundreds of thousands, joinder of the Class members' claims would plainly be impracticable. See Boykin v. Georgia- Pacific Corp., 706 F.2d 1384, 1386 (5th Cir.1983), cert. denied, 465 U.S. 1006,

104 S.Ct. 999, 79 L.Ed.2d 231 (1984) (317-member class met numerosity requirement).

2. Commonality

Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B J. Moore and J. Kennedy, Moore's Federal Practice P 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, 782 F.2d at 472 ("The threshold of 'commonality' is not high," as "the rule requires only that resolution of the common questions affect all or a substantial number of the class members"); Walker v. Jim Dandy Co., 638 F.2d 1330, 1336 (5th Cir.1981). That requirement has been met. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes the insurance proceeds. See Georgine, 157 F.R.D. at 316; 2 Newberg on Class Actions s 11.28, at 11- 58-11-60. See also Jenkins, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

3. Typicality

"The 'typicality' requirement focuses ... on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." Jenkins, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg on Class Actions s 11.28, at 11-58. The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 272 (E.D.Tex.1985), aff'd, 782 F.2d 468 (5th Cir.1986); see also In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 817 (3rd Cir.1995) (noting that individual issues of causation, reliance, and damages do not ordinarily preclude class action treatment of mass torts); Ladd v. Dairyland County Mut. Ins. Co., 96 F.R.D. 335, 337 (N.D.Tex.1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

4. Adequacy of Representation

The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, 109 F.R.D. at 273.

a. Class Counsel

Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar, were well qualified to serve as Class Counsel in this case, and the Court is satisfied that Class Counsel adequately represented the class.

The Ortiz Intervenors contend that Class Counsel's representation was inadequate due to a conflict created by their representation of present claimants at the same time they were negotiating on behalf of the Class. The Court is satisfied that any potential conflicts that could theoretically have arisen between Class Counsel's present claimants and the Class never materialized. Indeed, given the short window of opportunity to negotiate a global settlement created by the Coverage Case appeal, the Court finds it unlikely that counsel less intimately involved with Fibreboard's overall asbestos problem could have reached nearly so favorable a settlement for the Class.

The Ortiz Intervenors also contend that the negotiation of an attorneys' fee agreement more or less at the same time as the negotiation of the Global Settlement taints Class Counsel's representation of the Class.

When fee and settlement negotiations occur simultaneously, there is a danger of collusion between class counsel and the defendant. In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d at 803. In the instant case, however, there is considerably less to the agreement than meets the eye. As a part of the Global Settlement Agreement, the Insurers agreed to fund an attorneys' fee award in addition to the settlement fund in an amount set by the Court up to 3% of the total settlement. Continental was willing to bear the costs of administering the settlement, but it was not willing to fund attorneys fees up to the 25% sometimes awarded class counsel in securities fraud class actions. Class Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not expect that any particular fee would be awarded. There is nothing about the fee agreement that would lead the Court to believe that Class Counsel's representation of the Class was in any way compromised.

b. Class Representatives

The Class representatives have also adequately represented the Class. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." Jenkins, 782 F.2d at 472; see also Georgine, 157 F.R.D. at 317 ("The key question is whether their interests are antagonistic.") (quoting Steiner v. Equimark Corp., 96 F.R.D. 603, 610 (W.D.Pa.1983)) (emphasis in original). And "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class

interests are not antagonistic for representation purposes." In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir.1981).

The Class representatives have a sufficient stake in the outcome, and the interests of the Class representatives and the members of the Class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The Class representatives and the members of the Class--all of whom are equally at risk in the coverage litigation--are united in seeking the maximum possible recovery for their asbestos-related claims. See Jenkins, 109 F.R.D. at 274.

The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." Georgine, 157 F.R.D. at 317. See Longden v. Sunderman, 123 F.R.D. 547, 558 (N.D.Tex.1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 77 (N.D.Tex.1984). "[T]he primary criterion for determining whether the class representative has adequately represented his class ... is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class." Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir.1973) (emphasis

added); accord Longden v. Sunderman, 123 F.R.D. at 559; Durrett v. John Deere Co., 150 F.R.D. 555, 558 (N.D.Tex.1993).

B. Rule 23(b)(1)(B)

Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure provides that a class action may be maintained if the prerequisites of subdivision (a) of Rule 23 are satisfied, and in addition "the prosecution of separate actions by or against individual members of the class would create a risk of ... adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Rule 23 is to be interpreted according to its "plain meaning." See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Indus. Corp., 493 U.S. 120, 123, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty or even a better-than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as--"more than a mere possibility" but "less than a preponderance." In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville "), 129 B.R. 710, 765, vacated on other grounds, 982 F.2d 721 (2d Cir.1992), modified, 993 F.2d 7 (2d Cir.1993); accord In re Granada Partnership Sec. Litigations, 803 F.Supp. 1236, 1244 (S.D.Tex.1992); In re Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher "), 134 F.R.D. 32, 35 (E. & S.D.N.Y.1990); In

re First Commodity Corp. Customer Accounts Litigation, 119 F.R.D. 301, 312 (D.Mass.1987); Jenkins, 109 F.R.D. at 276-77; In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713 (E.D.Mich.1985); In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y.1983), aff'd, 818 F.2d 145 (2d Cir.1987), cert. denied, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988).

No one disputes that there was a significant risk--more than a mere possibility--that Fibreboard would lose on one or more issues in the Coverage Case, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program. The Court heard expert testimony regarding the risks, and the risk inherent in Fibreboard's insurance dispute is further reflected in the fact that Fibreboard's settlement average under its no-cash assignment settlement program was more than twice its the settlement average under the 40% cash SSP. The risk that available funds could be inadequate to pay all claims constitutes a risk of substantial impairment under Rule 23(b)(1)(B).

The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution. Numerous courts applying Rule 23(b)(1)(B) have certified classes under the Rule where allowing separate actions would have created a risk that early individual adjudications would have exhausted all available assets. See, e.g., Manville, 982 F.2d at 738-39; In re Drexel Burnham Lambert Group, 960 F.2d 285, 292 (2d Cir.1992), cert. dismissed, --- U.S. ----, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926), CV 93-P-

11433-S (N.D.Ala., June 1, 1993); In re Granada, 803 F.Supp. at 1244; Eagle-Picher, 134 F.R.D. at 35; County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407, 1418 (E.D.N.Y.1989), aff'd, 907 F.2d 1295 (2d Cir.1990); Bush v. Rewald, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 92,999, 1986 WL 15338 (D.Haw., Sept. 4, 1986); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 712-13 (E.D.Mich.1985); Coburn v. 4-R Corp., 77 F.R.D. 43, 45-46 (E.D.Ky.1977). See also Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 276 (E.D.Tex.1985), aff'd, 782 F.2d 468 (5th Cir.1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers, and the claims of all class members against Fibreboard and the insurers. The Global Settlement involves a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted from a unique set of circumstances not likely to be repeated. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses--a situation that falls squarely under Rule 23(b)(1)(B). See In re Jackson Lockdown, 107 F.R.D. at 708, 712; In re A.H. Robins, 85 B.R. at 380.

Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's

own funds, or with insurance funds that are not the subject of genuine and vigorous dispute is not a question this Court need answer here. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and there might not be the "impair[ment]," to class members' "ability to protect their interests" required for mandatory class certification by Rule 23(b)(1)(B), so long as the defendant has adequate funds to pay all class members' claims. The destruction of the settlement fund here, however, constitutes a "risk" within the meaning of Rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear entirely if the settlement were to fall through--with the result that Class members could not then secure their due through litigation.

The Ortiz Intervenors and the Flanagan Intervenors object that this class action cannot be maintained under Rule 23(b)(1)(B), alleging that there is no genuine "limited fund" because Fibreboard is allowed to retain most of its non-insurance assets under the settlement. The objection is misplaced for two reasons. First, although the limited fund situation is commonly associated with Rule 23(b)(1)(B), the Rule itself does not require a limited fund. Second, even under a limited fund analysis, and there is a limited fund in this case, see Conclusions of Law PP 37-39, the fact that Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is

fair. Drexel, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., In re Granada, 803 F.Supp. at 1244; Bush, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all.

FAIRNESS ISSUES

Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate, and reasonable." Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982); In re Corrugated Container Antitrust Litigation, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., Evans v. Jeff D., 475 U.S. 717, 727, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986); Holmes v. Continental Can Co., 706 F.2d 1144, 1160 (11th Cir.1983); Cotton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir.1977). There is a strong presumption in favor of the settlement's fairness. Parker, 667 F.2d at 1209; Cotton v. Hinton, 559 F.2d at 1331; Mashburn v. National Healthcare, Inc., 684 F.Supp. 660, 667 (M.D.Ala.1988); Manual for Complex Litigation, s 30.41 (2nd ed. 1985).

The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation."

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 850 (5th Cir.1975). Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." Cotton, 559 F.2d at 1330 (some citations omitted).

A. The Reed Factors

The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class- action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir.1983). All factors support approval of the Global Settlement here.

Asbestos litigation is undoubtably the most "mature" of all mass tort litigation. The primary factual and legal issues such as disease causation, product, jobsite and defendant identification and standard of care have been identified and developed through extensive litigation. Despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex. The problem now is that

asbestos litigation has become over-mature. Issues that have already been fully developed and resolved are nonetheless rehashed and relitigated, all contributing to the delay, high transaction costs, and arbitrary results that have become the hallmarks of asbestos litigation.

At the time the Global Settlement was reached, Class Counsel were thoroughly familiar with asbestos litigation in general and with Fibreboard's situation in particular, and were extremely well-equipped to represent the interests of the Class. The Global Settlement was the result of hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would actually be reached. The record contains no evidence of collusion, and establishes that the Global Settlement amount of $1.535 billion is well within the range of values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it, at a cost of more than $22 million. It is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement, and the Court is satisfied that the Global Settlement is fair, reasonable and adequate.

B. The Alternatives

It is appropriate in assessing the fairness of a class settlement to compare the risks and rewards of the Global Settlement with other possible outcomes. While there is no way to predict Fibreboard's future asbestos liability with any certainty, the Court can, based on the work of the experts and the views of counsel, assess the risks to the Class associated with each of the three basic "scenarios" that are presented by the record: the "Coverage Case scenario"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

The Coverage Case scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval and the Coverage Case is prosecuted to a conclusion in the California courts. Under this scenario, there is a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. In that event, Fibreboard would at best be able to meet only a small portion of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated.

Even a total win in the Coverage Case would not guarantee that the Class would be fully compensated. There is a significant risk that Fibreboard's assignment settlement program may have entirely vitiated the Continental insurance, which would leave Fibreboard with only several hundred million dollars to cover both pre- and post-1959 claims. Any such outcome would guarantee, again, a massive shortfall in funds to

compensate the Global Health Claimant Class--and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted.

And even if Fibreboard were to win in the Coverage Case and Fibreboard's right to engage in the assignment settlement program were upheld so that Fibreboard had unlimited coverage for pre-1959 cases, the post-1959 cases, for which Fibreboard would be solely responsible, would sooner or later drive Fibreboard into bankruptcy. Transaction and indemnity costs would quickly consume Fibreboard's relatively modest assets. If Fibreboard were able to obtain the necessary court orders to effect the Pacific II Agreement, its demise might be delayed a few years, but it would not be averted. Fibreboard's bankruptcy would be a disaster for the post-1959s, and for the pre-1959s it would prove to be at least a major and expensive inconvenience.

In comparing the Coverage Case scenario with the Trilateral Settlement, the question is whether--from the standpoint of class members--it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the Coverage Case appeal and the possibility, regardless of the outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and--given Fibreboard's limited non-insurance assets--the devastating effect that such outcomes would have on class members, the Trilateral Settlement is superior to no settlement at all.

Although the Trilateral Settlement scenario eliminates the risk of the Coverage Case, it is nevertheless problematical for the Global Health Claimant Class. There is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Class without compensation in the event individual actions and adjudications with respect to class member claims were to be permitted.

Under the Global Settlement scenario, although there are substantial uncertainties involved, and although there is a significant risk--more than a mere possibility--that there will be a shortfall, all Class claims will more likely than not be paid at fair and appropriate values, although it is possible some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust.

The funds provided under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement. Under the Trilateral Settlement, however, Fibreboard's non-insurance assets are reachable by asbestos claimants. But this does not mean that more money will actually reach asbestos claimants under the Trilateral Settlement. Fibreboard's total sale value free of all its asbestos liabilities is only $235 million, which is considerably less than the likely savings in defense costs under the Global Settlement. In fact, taking into account the substantially lower transaction costs under the Global Settlement, the Global Settlement will provide substantially more money--at least hundreds of millions of dollars--that actually reaches class members for compensation

of their claims than will be provided to them under the Trilateral Settlement. And although there is some risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a substantial likelihood that the funds will be insufficient to compensate all class members. Under the Global Settlement, the operation of the Trust will result in a far more cost-effective system that promotes the settlement of claims rather than the defense of them. If the Global Settlement is not ultimately approved, the only winner will be the asbestos litigation industry--lawyers on both sides, doctors, consultants, other expert witnesses, etc.--which has historically consumed as much as 63 cents of each asbestos litigation dollar. See Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Under the Trilateral Settlement, there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants.

Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust--in contrast to the 33%-40% fees claimants' attorneys would often recover under the Trilateral

Settlement--thus increasing the compensation that is provided to claimants rather than to their lawyers.

Additionally, under the Global Settlement, the operation of the Trust will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. As or more importantly, operation of the Trust under the Global Settlement will provide a fair method for compensating claimants that is more efficient and less burdensome than those claimants would experience under the tort system.

CONCLUSION

In sum, the Global Settlement, like all of the settlements involved in this action, is fair, reasonable, and adequate, and inheres to the substantial benefit of its subject class. The Global Settlement is the product of hard- fought arms-length negotiations by competent counsel, and the amount of the settlement is easily within the range of values that the Court could approve. Under the facts of this case, a mandatory, non-opt-out class action is not only an appropriate vehicle to effect the settlement, it is the only way that the settlement could be accomplished. The Global Settlement is better both for the Class and for Fibreboard than the Trilateral Settlement, and both the Global Settlement and the Trilateral Settlement are far superior to the Coverage Case scenario. This Court sees no reason why the Global Settlement should not be approved.

The Court on this date also enters its Findings of Fact and Conclusions of Law and the various judgments that collectively reflect the Court's approval of the Global Settlement. What remains is for the Court to review the Report and Recommendation of the magistrate judge regarding attorneys' fees and any objections that may be lodged against it.

The Court would be remiss if it did not note that the attorneys for Fibreboard, Continental, Pacific, the Class, the Ortiz Intervenors and the Ad Litems have performed their tasks in the best tradition of this old and honored profession.

FILED

(3)

No. 96-961394 MAR 3 1997

OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

(Pp. 209 – 435.)

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

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March 3, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated, Plaintiffs	:	Civil Action No. 6:93cv526
v.	:	
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,	:	
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:	
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:	

FINDINGS OF FACT

July 27, 1995

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FINDINGS OF FACT

The Court makes the following preliminary findings of fact:[1]

I. INTRODUCTION

1. This is a class action commenced in connection with a settlement of contested and threatened litigation pursuant to Fed. R. Civ. P. 23(b). The agreements now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. As detailed below, there has been nothing feigned or collusive about the negotiations that brought the parties to court. The disputes among the parties are real and, unless the settlement is approved, those disputes will continue. The controversies between the litigants are not moot. The disputes tendered for resolution are ripe and the parties have properly presented the requested adjudication of rights by this Court.

2. The principal parties to this litigation are the following:

-- Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William

---

[1]To the extent the following findings of fact include conclusions of law or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court.

James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class").[2]

-- Fibreboard Corporation ("Fibreboard"), which manufactured and distributed asbestos-containing products from the 1920s until 1971. See Findings of Fact ¶ 24.

-- Continental Casualty Company ("Continental"), CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard. See Findings of Fact ¶ 37.

-- Pacific Indemnity Company ("Pacific"), which Fibreboard alleges issued it a general liability policy. See Findings of Fact ¶ 37. (Continental and Pacific are sometimes collectively referred to herein as the "Insurers.")

-- Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant

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[2]The formal definition of the Global Health Claimant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

class of third-party claimants (the "Global Third-Party Claimant Class").[3]

-- Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class").[4]

-- Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Interveors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement.

-- James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

3. Diversity of citizenship is present and is uncontested. Each class member alleges, in good faith,

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[3]The formal definition of the Global Third-Party Claimant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

[4]The formal definition of the Longshore Defendant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

entitlement to damages in excess of $50,000, exclusive of interest and costs. This Court has subject matter jurisdiction over these proceedings.

4. Each member of the Global Health Claimant Class alleges exposure to asbestos, a well-documented human carcinogen, and therefore an increased risk of contracting cancer. In re Joint Eastern and Southern District Asbestos Litigation ("Manville"), 129 B.R. 710, 739-40 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992); Tr. at 544.[5] A number of courts, including the trial court in the coverage litigation between Fibreboard and the Insurers, have found that exposure to asbestos causes injury at the cellular level.[6] See, e.g., Carlough v. Amchem Products, Inc., 834 F. Supp. 1437, 1454 (E.D. Pa. 1993). Accordingly, each member of the Global Health Claimant Class alleges injury-in-fact sufficient to confer standing.

5. Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, inter alia, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. The Court takes judicial notice that it is not at all uncommon that asbestos

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[5]Citations to "Tr. at ___" are to the daily transcript of the fairness hearings conducted herein.

[6]In making this finding, however, the Court in no way finds that such cellular or subclinical injury is sufficient to constitute "bodily injury" within the meaning of insurance policies.

plaintiffs recover jury verdicts substantially in excess of $50,000 notwithstanding the absence of disability or medical impairment, typically in pleural thickening cases. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 816 (Cal. 1993); Miranda v. Shell Oil Co., 15 Cal. Rptr. 2d 569 (Cal. Ct. App. 1993); Barras v. Monsanto Co., 831 S.W.2d 859 (Tex.App.- -Houston [14 Dist.] 1992, writ denied). Fibreboard's headquarters are located in California, Fibreboard Exh. 706, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

II. HISTORY OF ASBESTOS LITIGATION

A. General Background

6. Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Trial resulted in a verdict in favor of the defendants. Tr. at 60. It is generally accepted that the tide of asbestos-related injury litigation flooding the nation's courts today turned on the result in the Borel case, an action filed in the Beaumont Division of thisCourt in 1969. Tr. at 131. All Borel defendants, including Fibreboard, were held liable, and on appeal the Fifth Circuit

affirmed. Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

7. Following Borel, and through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified, the primary target being Johns-Manville, Inc. ("Manville"). Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. Tr. at 128, 131-32, 937-38; Fibreboard Exh. 102 at vii; Manville, supra, 129 B.R. at 743-45.

8. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically. Class Plaintiffs Exh. 1014; Tr. at 133; Manville, supra, 129 B.R. at 745-51; Class Plaintiffs Exh. 1014 (Transcript of Deposition of Lawrence Fitzpatrick, Feb. 22, 1994, Georgine v. Amchem Products, Inc., Civil Action No. 93- 215 (E.D. Pa.) ("Fitzpatrick Tr.")) at 72-76.

9. Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously considered to be immune fromfinancial difficulty. See In re Asbestos Products Liability Litigation, 771 F. Supp. 415, 420 (J.P.M.L. 1991). Beginning in 1982 with Unarco Industries, Inc. and Manville, the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation,

National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc. Fibreboard Exh. 919, Tab 4.

10. Before it entered bankruptcy, Manville, which had supplied the largest share of asbestos-containing products, basically controlled the defense of asbestos litigation na- tionwide. Fitzpatrick Tr. at 74. Manville paid on an aggregate basis approximately 30% to 33% of the funds paid in asbestos settlements. After Manville entered bankruptcy in 1982, and stopped paying money in asbestos cases, other asbestos defendants generally believed that they did not receive settlement credits or set-offs reflecting Manville's share. Tr. at 132-34, 1133-34; Fibreboard Exh. 100 at 5.

11. As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their claims resolved. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 7-12 (1991) (Class Plaintiffs Exh. 1003). Transaction costs outpaced compensation to victims. Id. at 12-14. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Fibreboard Exhs. 100-102.

12. Asbestos litigation constitutes "an unparalleled situation in American tort law." In re School Asbestos Liti- gation, 789 F.2d 996, 1000 (3d Cir.), cert. denied, 479 U.S. 852 (1986). Citing the Asbestos Ad Hoc Committee Report, the Judicial Panel for Multidistrict Litigation

summarized what it termed the "most objectionable aspect of asbestos litigation":

> dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

In re Asbestos Products Liability Litigation, supra, 771 F. Supp. at 419 (citing Asbestos Ad Hoc Committee Report at 1-3).

13. By 1986, counsel, commentators and courts began to recognize the enormous problems facing all involved in asbestos litigation. In 1987, the Federal Judicial Center convened a conference to discuss the asbestos litigation crisis and the need for some type of overarching resolution. The conference included judges with significant asbestos dockets across the country and some leading members of the asbestos plaintiffs' bar. Participants addressed many of the conditions outlined above, including the growing backlog of cases, the fact that new cases were being filed at a much greater rate than existing cases could be tried or settled, the fact that transaction costs greatly outweighed the victims' recoveries, and the growing number of bankrupt defendants. Fitzpatrick Tr. at 72-77. Despite the widespread recognition of these problems, the asbestos crisis continued to worsen. By 1990, overwhelmed asbestos courts had turned to novel mass adjudication techniques. Fibreboard Exhs. 104, 105, 107-117, 120-124.

14. In 1990, the Federal Judicial Center convened another conference of judges, academics and counsel to address the continuing issues related to asbestos litigation. This took place at the Dolley Madison House in Washington, D.C. The 1990 Federal Judicial Center conference was a significant event in the history of asbestos-related litigation. Many of those involved, including counsel for Fibreboard, came away with a clear impression that "business as usual" would not be a judicially acceptable solution to the problem. Tr. at 211; Fitzpatrick Tr. at 82-84.

15. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps to- ward national action on the asbestos problem. A number of federal judges organized to explore class action treatment of the problem. Fitzpatrick Tr. at 84-86.

16. In July 1990, some leading members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed. R. Civ. P. 23(b)(1)(B), Linscomb v. Pittsburgh Corning Corp., et al. The action was commenced on behalf of all persons (present and future) with asbestos- related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Fibreboard Exh. 116. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be

found. Fitzpatrick Tr. at 87-89; Class Plaintiffs Exh. 1002; Fibreboard Exh. 117.

17. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the MDL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23." Fibreboard Exh. 118; Fitzpatrick Tr. at 93-95.

18. In March 1991, the Asbestos Ad Hoc Committee issued its report. Class Plaintiffs Exh. 1003. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 265 (E.D. Pa. 1994). The Asbestos Ad Hoc Committee stated:

> [T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the

courts are ill-equipped to meet effectively. Asbestos Ad Hoc Committee Report at 2.

19. The Asbestos Ad Hoc Committee also expressed its hope that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. Id. at 14. It concluded, id. at 10, that:

The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases.

20. On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings.[7] In re Asbestos Products Liability Litigation, supra, 771 F. Supp. 415. The MDL Panel voiced its hope that the MDL transfer might foster global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve

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[7]In the hearing before the MDL Panel, the majority of the plaintiffs' bar had favored the Eastern District of Texas as the transferee forum in connection with the MDL proceedings, if there was to be a transfer of cases. Fitzpatrick Tr. at 95. It is a matter of common knowledge that asbestos claimants from across the country, and from outside the United States, frequently select courts in Texas -- and this District in particular -- as the venue in which to pursue their asbestos personal injury actions. The Court notes that substantial numbers of the most recent asbestos personal injury filings against Fibreboard in Texas by the Baron & Budd firm, counsel for the Ortiz Intervenors, were apparently on behalf of residents of states other than Texas. Fibreboard Exh. 824.

these asbestos matters fairly and with as little unnecessary expense as possible." Id. at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims were pending in the federal courts, with two times that number pending in the state courts. Id. at 416, 421. Linscomb was transferred to Judge Weiner as part of the MDL proceedings.

21. After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder,[8] counsel for Fibreboard, as a member of the Defendants' Steering Committee. Judge Weiner made clear that he wanted the litigants to solve the asbestos crisis on a global basis. Tr. at 125; Fitzpatrick Tr. at 99-100, 110-11.

22. Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. Tr. at 221. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative

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[8]Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Tr. at 118. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Tr. at 118. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases. Tr. at 120-23.

resolution mechanism for asbestos claims. Judge Weiner encouraged these global settlement negotiations. Fitzpatrick Tr. at 110-11. These talks did not result in a global settlement, Fitzpatrick Tr. at 114-17, but they did serve as a springboard for other, less inclusive negotiations, including those that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See Georgine, supra, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements. Tr. at 221.

23. At the time of the settlement negotiations un- derlying this class action, asbestos litigation was probably the most "mature" mass tort litigation in this country: i.e., the liability and medical issues pertinent to such litigation had been the subject of thorough and repeated discovery, trial and settlement. Georgine, supra, 157 F.R.D. at 321-22; F. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659 (1989). The results of this experience were known to counsel for the plaintiff class in this action, as well as to counsel for Fibreboard and, to some lesser extent, its insurers. Tr. at 937-38, 2162, 2720.

B. Fibreboard Background

24. As asbestos-related defendants were sued on a regular basis, Fibreboard became known as an "all-years" defendant because its asbestos-containing products had been distributed from the 1920s until 1971, when it ceased producing

asbestos-containing products. Tr. at 127-28. In contrast, some defendants are generally recognized to bear liability for exposure to asbestos that occurred only during certain periods of time. In addition, Fibreboard was and is considered to be primarily a "pipe and boiler" defendant, in that its products frequently were used in high-temperature industrial applications involving shipyards, boiler rooms, shops, refineries, and similar applications. Most other defendants were primarily manufacturers of asbestos-containing roofing products, construction materials and linoleum flooring. Tr. at 128. Fibreboard became known as a regional defendant because its primary manufacturing facilities and distribution networks during most of the relevant years were in California. Fibreboard had a primary exposure to liability in West Coast and Gulf Coast (especially Texas) cases, rather than in cases in the East. Tr. at 128, 131, 2448-49.

25. In 1983, Fibreboard suffered its first punitive damages verdict. Tr. at 118, 400. Nonetheless, perhaps be- cause there is no "treasure trove" of inculpatory Fibreboard documents, Tr. at 440, Fibreboard never became a punitive damages target defendant. Tr. at 400. With one exception, Fibreboard ultimately never paid a punitive damages judgment in connection with an asbestos personal injury claim. Tr. at 399; Fitzpatrick Tr. at 130.

26. Fibreboard generally experienced greater liability in cases of earlier exposure to asbestos than in cases of later exposure. That was because (i) Fibreboard had a greater share of the pipe and boiler insulation markets in the earlier years (i.e., before the mid-1950s) than in later years (i.e., the late 1950s and 1960s); (ii) the bankruptcy of other defendants with

Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company, totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending litigation. Tr. at 148-49. When it left the ACF, Fibreboard did not have enough cash to pay settlements of asbestos injury cases, Tr. at 153, and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF. Tr. at 149-50.

35. From before the time it entered the ACF in 1985, and to this day, Fibreboard's corporate goal was, and has been, to manage and resolve its asbestos liabilities within its available insurance resources. Tr. at 144.

III. FIBREBOARD INSURANCE COVERAGE LITIGATION AND ATTENDANT RISKS

36. Fibreboard's insurance coverage litigation, which came to be captioned In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case"), commenced in 1979 when Fireman's Fund Insurance Company filed a complaint in San Francisco County Superior Court against Fibreboard and others, including Continental and Pacific. Fibreboard Exh. 203. Fibreboard's other insurers later became parties to this litigation.

Fibreboard Exh. 204. In 1981, the action was coordinated with several separate asbestos coverage cases then pending in California. In 1983, Judge Ira A. Brown, Jr., was confirmed as coordination trial judge. Fibreboard Exhs. 205-207. Judge Brown ordered the parties to produce all relevant documents as part of a massive discovery effort. Fibreboard Exhs. 208, 209, 211.

37. Fibreboard alleged that Pacific insured it from 1956 to 1957 under a no-aggregate-limit policy, but was unable to locate a copy of the policy. Pacific denied that the policy had no aggregate limit. Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The premium for this policy was less than $10,000 per year. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit, and a $500,000 per claim limit. Fibreboard Exh. 201.

38. The Coverage Case was tried in several phases. The trial was one of the largest and most complex proceedings in the history of American civil jurisprudence, involving numerous insureds and insurers. Fibreboard Exh. 215 at 1340-42. Phase I involved the existence and terms of certain missing insurance policies, including the missing Pacific policy. Fibreboard was not involved in Phase II. Phase III involved the basic coverage provisions of the policies, including the trigger of coverage and scope of coverage. Phase IV involved multiple subphases, including Continental's "number of occurrences" issue, scope issues concerning whether the policy-holders should be required to contribute to claims costs, and the Insurers' contribution rights against each other. Fibreboard was not

> a percentage was determined for each producer as a total of all producers." Regarding "defense costs, the allocation was derived by taking each producer's number of pending claims, divided by the total number of pending claims for all producers combined."

29. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers -- but not with Continental or Pacific -- in order to enter the ACF. Tr. at 138. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

30. When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. Tr. at 144. During ACF operations (June 1985 to September 1988), its members enjoyed lower defense costs because the number of defense counsel serving ACF members in asbestos cases fell from as many as 1,200 law firms to approximately 65 firms. Tr. at 139; Fibreboard Exh. 102 at 31. Within the ACF, Fibreboard paid close to 13% of all settlements made on behalf of any member. Tr. at 140.

31. In the Western United States there was some success from Fibreboard's perspective in reducing filings of claims by "non-impaired" claimants, i.e., people with some exposure to asbestos who had no significant medical impairment or disability, and indemnity values in other types of cases were

kept within reasonable limits. This was accomplished by means of an expensive, labor-intensive litigation effort involving considerable trial activity. However, these results were not obtained elsewhere for Fibreboard within the ACF, and the filing of asbestos claims against Fibreboard in the Eastern United States and in Texas increased substantially during the ACF years. Tr. at 143-46. In the end, ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues.

32. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged. Tr. at 136-37, 2669-70, 2679-80.

33. Filings of new asbestos-related cases against Fibreboard in 1982 through 1984 were in the range of 4,500 to 5,000 cases per year. With rumors that the ACF might be established, and upon its advent in June 1985, filings of such cases increased to over 8,000 in 1985. In the remaining full years of the ACF -- 1986 and 1987 -- filings stayed at a high level, in the range of 13,000 to 17,000 cases per year. Tr. at 136.

34. When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Tr. at 148-49.

substantial liability exposures arising out of early years, such as Manville, Eagle-Picher and Celotex, had the greatest impact on defendants such as Fibreboard who also had liability for early-years exposures; (iii) Fibreboard can produce evidence that it began to give warnings with respect to the health hazards of its products in 1966; and (iv) cases arising out of early exposures, such as those in World War II shipyards, tended to be more serious. Tr. at 129-31.

27. Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on Manville to bear the brunt of the defense of cases. Tr. at 131. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary. Tr. at 131-32.

28. Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint representation in asbestos-related personal injury litigation. The general operation of the ACF (also known as the Wellington Facility, after Dean Wellington of the Yale University Law School, who assisted in the negotiations leading to its formation), is well known by the Court and is described in a number of judicial opinions. See, e.g., Unigard Security Insurance Company, Inc. v. North River

Insurance Co., 4 F.3d 1049, 1056 (2d Cir. 1993) (internal citations omitted):

> As a result of the massive liability for asbestos-related claims, the expense of litigation between producers and their insurers, and the administrative costs of managing nationwide litigation and claims, an agreement concerning asbestos-related claims, known as the Wellington Agreement, was signed by producers of asbestos and their insurers on June 19, 1985. . . . The Agreement established the Asbestos Claims Facility ("the Facility") to "administer and arrange for the evaluation, settlement, payment or defense of all asbestos-related claims against Subscribing Producers and Subscribing Insurers in accordance with the provisions of the Agreement. . . ." Moreover, as "sole agent, the Facility [had] exclusive authority and discretion to administer, evaluate, settle, pay or defend all asbestos-related claims."
>
> Once the Facility settled a claim, the liability amount and the defense costs were allocated among the producers of asbestos . . . according to a producer-allocation formula. The producer-allocation formula was actually two formulae, one for indemnity (or to pay the annual claim) and one for defense costs. "To share indemnity, each producer's historical average cost by state was multiplied by that producer's pending claims in that state. And the product was summed and

involved in Phase V. Fibreboard Exh. 223. At stake for Fibreboard and the Insurers was the question of whether Fibreboard would be determined to have no further insurance coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

39. In March 1985, a jury in Phase I of the Coverage Case trial found that Pacific had issued a one-year comprehensive general liability policy to Fibreboard's predecessor in 1956. The jury also found, by a nine to three vote based on a preponderance of the evidence standard of proof, that the policy had a $500,000 per claim limit, but no aggregate limit. Tr. at 138; Fibreboard Exh. 223.

40. The Phase III issues, including the trigger and scope of coverage, were tried and argued to the court between September 1985 and February 1987. In May 1987, Judge Brown issued a tentative decision in Phase III of the Coverage Case in favor of the policyholders. Fibreboard Exh. 219. He found that a "continuous" trigger existed, which meant that policy coverage applied to any claim where the claimant had been exposed to any asbestos prior to the expiration date of the policy. He thus rejected an "exposure only" trigger, under which a policy would respond only to claims as to which exposure to asbestos occurred during the policy period, and like- wise rejected a "manifestation" trigger, under which a policy would respond only to claims as to which injury became apparent during the policy period. The Insurers had taken various positions on trigger of coverage in the trial court. Pacific took the manifestation position and Continental took no position. Fibreboard Exh. 200. Judge Brown further found that the scope of each triggered policy extended to full responsibility

for defense and indemnity on a claim within policy limits, and did not adopt a pro rata approach, which would have limited each insurer's responsibility to a proportion of the liability. In addition, Judge Brown's scope decision did not obligate the policyholder to contribute for uninsured or underinsured periods. Fibreboard Exh. 219.

41. The Phase IV issues, including the number of occurrences and reserved scope issues, were tried to the Court in the Fall of 1987. Among other issues, Continental asserted that its policy had a maximum limit of $2,000,000 for Fibreboard's asbestos bodily injury claims because of its $1,000,000 per occurrence limit. Continental urged that there were only two occurrences under the policy, contending that "occurrence" referred to the sources of Fibreboard's asbestos-containing products, and only two Fibreboard plants had manufactured such products. In August 1988, Judge Brown issued a tentative decision in Phase IV of the Coverage Case. Judge Brown rejected Continental's contentions on the number of "occurrences," holding instead that each claim constituted a separate occurrence. Judge Brown also tentatively ruled that each triggered policy is responsible for the full costs of a claim, with the right to seek contribution from other triggered policies. Fibreboard Exh. 220.

42. On January 24, 1990, the trial court rendered judgment in the Coverage Case. Fibreboard Exh. 223. the judgment incorporated the jury's findings as to the existence and terms of the Pacific policy. It incorporated in substance the "continuous trigger" and "scope" rulings set forth in the Phase III tentative decision, and the "occurrence" ruling set forth in the Phase IV decision. Fibreboard Exhs. 222, 223. Judge Brown

denied all motions for a new trial and for judgment notwithstanding the verdict. Fibreboard Exh. 224.

43. Insurers, including Continental and Pacific, appealed the trial court's decision in the Coverage Case, and the appeals were consolidated. The appellate record was extraordinarily voluminous. In November 1990, the California Court of Appeal issued an order calling for separate briefing by "issue groups." Appellate briefing took place between April and November 1991. Issue Group I included the Pacific missing policy issues. Pacific argued that the court should have instructed the jury that the burden of proof was by a "clear and convincing" standard rather than a "preponderance of the evidence" standard. Issue Group II addressed the basic coverage issues of the trigger and scope of coverage for asbestos bodily injury claims, as well as certain issues unique to Continental (the number of "occurrences" and the so- called "double anchor" question, viz., whether it was necessary that exposure and injury both occur during the policy period). Fibreboard Exhs. 225-242, 245, 246.

44. Oral argument upon the Coverage Case appeal was conducted in several phases during the Summer of 1993. Continental Exh. 23; Fibreboard Exhs. 243, 247. In late July 1993, the parties to the Coverage Case appeal were informed by the California Court of Appeal that oral argument upon the final phase of the appeal had been scheduled by that court for August 27, 1993, and, on that date, the final oral argument before the Court of Appeal in fact was heard. Tr. at 329, 1400-01, 1480-81; Fibreboard Exh. 248. On that same day an agreement in principle was announced in this Court with

respect to the settlement that is now before this Court for consideration. Findings of Fact ¶ 179.

45. After the announcement of the global agreement in principle on August 27, 1993, the parties to that agreement wrote to the California Court of Appeal advising the court of the agreement in principle and asking that the court defer decision in the Coverage Case, at least with respect to those issues unique to Fibreboard and the Insurers pending the completion of the documentation necessary to consummate the settlement contemplated by the agreement in principle. Fibreboard Exhs. 249, 252.

46. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment in the Coverage Case, while reversing the trial court as to one such aspect that had been decided in Fibreboard's favor and against the Insurers. Fibreboard Exh. 254. However, the Court of Appeal simultaneously granted the joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Tr. at 1497-98; Fibreboard Exh. 253. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

47. Requests for rehearing by the Court of Appeal as to the issues the Court of Appeal did decide were thereafter denied. Fibreboard Exh. 255. On January 27, 1994,

Insurance. Co., 5 Cal. Rptr. 2d 356 (Cal. Ct. App. 1992), aff'd 1995 WL 389860, ___Cal. Rptr. 2d___ (1995), and/or Stonewall Ins. Co. v. City of Palos Verdes Estates, 9 Cal. Rptr. 2d 663 (Cal. Ct. App. 1992), review granted, 834 P.2d 1147 (Cal. 1992). According to Justice Kaufman, although not identical, both the Montrose and Stonewall cases involve "trigger of coverage" issues.[12] Stonewall also involves the "scope of coverage" issue. Continental Exh. 5 at 10, ¶ 19.

52. In addition, according to Justice Kaufman unless the California Supreme Court vacates the "grant and hold" status of the Coverage Case and either decides to hear the issues in the Coverage Case or dismisses review, it is likely that, once it has decided Montrose and/or Stonewall, the Supreme Court will remand the Coverage Case to the Court of Appeal. In that event, the Court of Appeal will be instructed to reconsider its Coverage Case opinion in light of the Supreme Court's Montrose and/or Stonewall decision(s), and the Court of Appeal will almost surely allow the parties the opportunity for further briefing and oral argument. The resulting decision of the Court of Appeal -- which would presumably also include the reserved issues -- would then be subject to another petition for review to the Supreme Court. Given the fact that Stonewall has not been set for oral argument yet, and the fact that after

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[12]On July 5, 1995, the California Supreme Court affirmed the appellate court's decision in Montrose. The supreme court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 1995 WL 389860 at n. 16, ___Cal. Rptr. 2d___, ___ n. 16 (1995).

Montrose and Stonewall are finally decided a remand of the Coverage Case to the Court of Appeal followed by another petition for review to the Supreme Court is likely, Justice Kaufman believes that the Coverage Case may not be finally concluded for five years or more. Continental Exh. 5 at 10-11, ¶ 20.

53. There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage; (ii) scope of coverage; (iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues -- trigger of coverage and scope of coverage -- involve both the Continental and Pacific policies. Two issues -- number of occurrences and double anchor -- involve only the Continental policy. The lost policy issue involves only the Pacific policy. Continental Exh. 5 at 11-12, ¶ 21.

54. The California trial court hearing the Coverage Case decided each of the five issues adversely to Continental and Pacific. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims.

the Insurers' petitions for review of the Court of Appeal's decision were granted by the California Supreme Court on a "grant and hold" basis, the effect of which is that the appeal is presently held in abeyance while the California Supreme Court considers issues in other pending appeals that may be dispositive of issues in the Coverage Case. Tr. at 1498; Fibreboard Exhs. 256, 258, 259; Continental Exh. 5 at 10, ¶ 19.

48. Two expert witnesses, Justice Marcus M. Kaufman and Professor George Priest, testified at the fairness hearing in this action with respect to the issue of the risk -- viewed both as of August 27, 1993 and today -- that Fibreboard would lose the Coverage Case pending in the California appellate courts.[9] No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

49. Justice Kaufman[10] provided expert witness testimony on the uncertainty -- as of both August 27, 1993 and the present --as to how the appellate courts will

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[9]The Court finds that the testimony of all of the witnesses offered in support of this settlement -- including that of Justice Kaufman and Professor Priest -- was credible.

[10]Justice Kaufman was in private practice from 1958 until 1970, specializing in civil litigation. He then served for seventeen years, from January 1970 until March 1987, as an Associate Justice of the California Court of Appeal, Fourth Appellate District, Second Division. From March 1987 until January 1990, he served as Associate Justice of the California Supreme Court by appointment of Governor George Deukmejian. Presently, he is of counsel to the law firm of Buchalter, Nemer, Fields & Younger. His practice consists principally of appellate litigation, often as a consulting expert, with special emphasis on insurance matters. Continental Exh. 5 at 1-2, ¶ 2.

resolve several legal questions in the Coverage Case that are either presently pending before the California Supreme Court or that were reserved for decision by the California Court of Appeal. In particular, he focused on the likelihood that the California Supreme Court (or the Court of Appeal on the reserved issues) will or will not afford the Insurers relief on one or more of the coverage issues raised, on the likely timing of potential rulings in the Coverage Case, on the likely effect resolution of other cases now pending before the California Supreme Court will have on the Coverage Case, and on the California judicial process in general. Continental Exh. 5 at 2-3, ¶ 3.

50. Professor Priest[11] provided expert testimony on the likelihood, as of both August 27, 1993 and the present, that the California appellate courts would provide the Insurers relief on one or more of the coverage issues raised. The Court finds that both Justice Kaufman and Professor Priest are highly qualified experts in their fields, and finds their conclusions and reasoning to be persuasive.

51. According to Justice Kaufman, it is likely that the Supreme Court decided to "hold" the Coverage Case pending the outcome in Montrose Chemical Corp. v. Admiral

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[11]Professor Priest is currently a Professor of Law at Yale University. Continental Exh. 6. The focus of his teaching and writing has been the study of the tort system, and, in particular, trends in tort and insurance law over the last 50 or 60 years, including recent developments. Tr. at 767. He has testified as an expert in both tort and insurance matters, including expert testimony about California insurance matters. Tr. at 767-68. Among his other duties at Yale, Professor Priest teaches a class on insurance, including an analysis of comprehensive general liability insurance policies and the California Supreme Court's approach to insurance matters. Tr. at 769-70.

It was also their opinion that the same risk exists today. Continental Ex. 5 at 12-46, ¶¶ 22-86; Tr. at 771-93.

55. Justice Kaufman's conclusions were based upon his analysis of (i) the policy language; (ii) the California Supreme Court 's current approach to the resolution of insurance coverage issues in particular and litigation in general; (iii) distinctions between the application of contract law pursuant to which insurance polices are to be interpreted and tort law under which an asbestos manufacturer's liability is determined; (iv) recent insurance cases either pending before or decided by the California Supreme Court or decided by other courts; and (v) recent California Supreme Court decisions in non-insurance cases. Continental Exh. 5.

56. Professor Priest focused on the trend of the law in both California and elsewhere against what he termed "enterprise liability." This trend includes interpreting insurance policies issues more narrowly in order to make insurance coverage more predictable and certain and therefore more available to consumers at reasonable prices. Tr. at 772- 91.

57. The Court finds that the risk attending the outcome of the Coverage Case was a matter of reasonable and substantial concern for counsel for all of the parties to the settlement at bar to have had, and to continue to have, and a legitimate factor and driving force in the negotiations that resulted in that settlement. Tr. at 792-93, 1056-59.

IV. FIBREBOARD'S RESPONSES TO ASBESTOS LITIGATION

A. The Fibreboard Structured Settlement Program

58. In August 1988, Fibreboard informed Continental that the ACF was dissolving, and contended that Continental was obliged to provide a defense in the asbestos injury cases being prosecuted against Fibreboard. Fibreboard Exhs. 400, 401. The ACF stopped operations and ceased providing a defense to its members in September 1988. Fibreboard had insurance proceeds of approximately $100 million available from settlements with AIG and with Home Insurance Company. Fibreboard's only other remaining insurance resources were the disputed coverages under the Pacific and Continental policies. Tr. at 148-49.

59. Upon dissolution of the ACF, Fibreboard was in a highly unusual situation compared to other asbestos defendants. It was a small company, valued by the market -- in light of its potential asbestos liabilities -- at $10 to $15 million. Tr. at 911-13; Fibreboard Exhs. 700, 701. It did not have enough cash to pay all or any substantial part of the asbestos injury claims asserted against it, but it had potentially very valuable insurance assets in the form of the disputed Continental and Pacific policies. Tr. at 169-70.

60. Faced with this situation, in September 1988 Fibreboard embarked upon a novel method of settling asbestos cases called the "Structured Settlement Program, " or "SSP." Under the SSP, Fibreboard agreed to make payments on a deferred basis, that is, payment would be made when the insurance coverage dispute with Continental and Pacific was resolved. Fibreboard approached members of the asbestos

plaintiffs' bar, revealed the facts about its corporate worth and its insurance situation, and asked for what in a sense was credit, or a "bridge" loan, to keep the company viable until the Coverage Case was finally resolved. As originally conceived, the SSP called for no cash payable at the time a settlement agreement was reached. Tr. at 170-71, 958.

61. However, the members of the plaintiffs' bar refused to accept the SSP as originally offered, insisting that they receive both cash and assurances that Fibreboard would not engage in asset-hiding tactics or other so-called "scorched-earth" ligation tactics. Tr. at 171-72. The attorneys whom other members of the asbestos plaintiffs' bar consulted on SSP-related matters were principally Steven Kazan and Harry Wartnick. Messrs. Kazan and Wartnick negotiated a revised program with Fibreboard by which 40% cash was payable for what came to be called "pre-1959" exposure cases, i.e., those cases in which the claimant was first exposed to asbestos before the end of the Continental policy period (March 15, 1959), and thus for which Fibreboard alleged it had coverage under the Continental and/or Pacific policies.[13] The deferred payments were due September 1, 1993, which deadline could be extended, if the Coverage Case was not by then resolved to September 1, 1996. The SSP contracts provided that Fibreboard would not make any excessive dividend distributions, or undertake corporate reorganizations that could siphon off corporate assets beyond the reach of asbestos claimants. Fibreboard Exh. 901; Tr. at 169-73.

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[13]Conversely, those cases or claims arising out of first exposure to asbestos after March 15, 1959, are commonly known as "post-1959" cases or claims.

62. Fibreboard's strategy was simple. It asked that claimants defer collection of agreed-upon settlement amounts until the Coverage Case was resolved. In return, it undertook to conserve corporate assets as the Coverage Case made its way through the appellate process. If Fibreboard won the Coverage Case, those plaintiffs who accepted SSP settlements would be paid from insurance proceeds. If Fibreboard lost the Coverage Case, all of the company's assets would be turned over to the plaintiffs. Tr. at 170-74.

63. The revised SSP was offered on a standard basis nationwide, and was accepted generally by plaintiffs' counsel. However, plaintiffs demanded increased settlement values reflecting the fact that the SSP vehicle presented a risk that they would never collect the deferred portion of the payment if Fibreboard lost the Coverage Case. Tr. at 176-77.

64. Fibreboard's strategy of deferring payment of settlements until resolution of its insurance disputes, and committing to keep corporate assets intact and available to claimants were the Coverage Case to be lost, differed from that taken by other asbestos defendants. Manville, which had the largest share of liability of any defendant (30% to 33%), entered bankruptcy while still an otherwise financially healthy company. Other asbestos defendants, such as Raymark and Celotex, spent considerable corporate resources defending cases as their corporate resources (including insurance) dwindled. These defendants adopted so-called "matrix" settlement systems, offering fixed, low-value settlement amounts for specific diseases, then reorganizing their corporate structures in such a way that remaining assets would not be available to claimants,

and then entering bankruptcy. These "scorched-earth" litigation tactics generated substantial trial activity. Fitzpatrick Tr. at 79-81; Tr. at 151-54; Fibreboard Exh. 101 at 12, 48.

B. The Fibreboard-Continental "Interim Agreement"

65. In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement." Fibreboard Exh. 900. The Interim Agreement included the following basic provisions:

> -- Fibreboard released Continental from claims for bad faith damages that were scheduled to be tried in the Coverage Case. -- Continental agreed to fund the 40% cash component of the SSP settlements, after Fibreboard first exhausted the monies it had available from the AIG and Home Insurance Company settlements.
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> -- If Fibreboard prevailed in the Coverage Case, Continental would repay or credit the AIG and Home Insurance Company monies Fibreboard had spent, in order that the credit amounts would be available to pay uninsured cases i.e., post-1959 cases. By the same token, if Fibreboard lost the Coverage Case, Fibreboard would reimburse Continental for monies Continental had paid for Fibreboard's defense and indemnity under the Interim Agreement.

-- Continental agreed to fund Fibreboard's defense up to annual limits, or "caps," of $25 million to $29 million per year.

-- Continental and Fibreboard agreed to cooperate in the joint investigation, evaluation, management, defense, and disposition of pre-1959 claims.

-- The Interim Agreement was to expire upon the earlier of the end of 1992, or finality of the appeal of the Coverage Case. Tr. at 174-75; Fibreboard Exh. 900.

66. The SSP did not solve Fibreboard's settlement problems. As other defendants were taken to trial, plaintiffs also often would take Fibreboard to trial rather than attempting to resolve credit or set-off problems created by the SSP. Tr. at 180-82. The SSP was not adequate to dispose of large groups of cases that were consolidated for trial. the result was that Fibreboard became a defendant in trials of large consolidated cases, including the Cimino case in this Court, the Denver Turley case in West Virginia, the Baltimore consolidated cases, and the Brooklyn Navy Shipyard cases. These circumstances generated substantial defense expenditures by Fibreboard. Tr. at 180-82; Fibreboard Exhs. 104, 105, 107-117, 120-124.

67. Fibreboard's efforts to adjust to the post-ACF litigation setting were very costly. Fibreboard's defense costs from September 1988 through 1989 were $50 million, almost twice the total face value of settlements negotiated during that period. In 1990, Fibreboard's defense costs were

$52 million, as compared to $45 million of nominal value in negotiated settlements. Fibreboard Exh. 919, Tab 3; Tr. 230-31, 432-33.

68. By June 1990, the annual defense 'cap" for all of 1990 under the Interim Agreement had been reached, and Continental therefore declined to pay for defense costs incurred thereafter in 1990. Fibreboard Exhs. 402, 405; Tr. at 181-82.

C. Fibreboard-Pacific Negotiations and the Fibreboard-Pacific Agreements

69. In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate complete settlements of the policies. Continental declined the proposal. Pacific and Fibreboard pursued such negotiations. Tr. at 184-85.

70. Fibreboard was interested in pursuing separate negotiations with Pacific because Fibreboard had no coverage for post-1959 claims. The Coverage Case judgment required each policy to respond to a claim as to which first exposure to asbestos occurred before the expiration date of the policy. Because the Continental policy followed the Pacific policy, under the judgment any claim covered by the Pacific policy was also covered by the Continental policy. Fibreboard Exh. 223; Tr. at 184-87.

71. Beginning in 1990 and continuing into 1992, separate negotiations between Fibreboard and Pacific

produced two separate agreements. On March 1, 1991, Pacific and Fibreboard entered into a written settlement entitled "Settlement Agreement." Fibreboard Exh. 902 (referred to as the "Pacific I Agreement"). The Pacific I Agreement provided that the parties would apply jointly to the California Court of Appeal to seek reversal of that part of the Coverage Case judgment that pertained to the Phase I jury verdict against Pacific (determining the existence and terms of the Pacific policy). The agreement provided that the settlement would become effective on the date the Court of Appeal's order reversing the judgment with respect to the Phase I verdict became final. The effect of such a reversal was intended to be the elimination of any further liability of Pacific under its policy. The Pacific I Agreement provided for payments by Pacific for Fibreboard's benefit totalling $142 million, of which $107 million was payable to a trust, for use exclusively to pay post-1959 asbestos injury claims, or, if not so needed, for asbestos property damage claims. Tr. at 186-88.

72. On March 5, 1991, a different division of the Court of Appeal from that in which the Coverage Case was pending issued an opinion in Neary v. Regents of the University of California, 278 Cal. Rptr. 773 (1991), rev'd, 834 P.2d 119 (Cal. 1992). The Court in Neary refused to reverse a trial court judgment on stipulation of the parties, where reversal was a condition to settlement. Tr. at 188; Fibreboard Exh. 903.

73. On April 19, 1991, Fibreboard and Pacific filed a motion for stipulated reversal of the judgment. The Court of Appeal denied the motion on October 3, 1991. Fibreboard Exh. 904. Thereafter, the time limit for achieving

the stipulated reversal expired and the Pacific I Agreement did not become effective. Tr. at 188-91.

74. On March 27, 1992, Pacific and Fibreboard entered into a second agreement. Fibreboard Exh. 905 (referred to as the "Pacific II Agreement"). Under the Pacific II Agreement, Pacific paid Fibreboard $9 million in the form of a loan, together with $1 million under a separate agreement providing for a rescission of the Pacific policy. Pacific also agreed to provide interim funding for defense and indemnity in excess of that provided by Continental, not to exceed $20 million. In addition, Pacific agreed to pay further sums to Fibreboard at the conclusion of the Coverage Case, but only if Fibreboard prevailed on the Phase III issues of trigger and scope. If so, and depending on the decision as to Phase I issues (the existence and terms of the Pacific policy), Pacific agreed to pay $105 million (if Fibreboard won on Phase I) or $80 million (if Fibreboard did not win). In addition, if Fibreboard obtained a "Final 5.2 Order,"[14] Pacific agreed to pay an additional $225 million (if Fibreboard won Phase I), or $140 million (if Fibreboard did not win). Thus, the Pacific II Agreement called for a maximum payment to Fibreboard of $360 million, of which $225 million depended on Fibreboard obtaining a "Final 5.2 Order." As was the case with Pacific I, these payments, other than interim funds, were to be paid into trust to pay post-1959 asbestos injury claims, with any surplus

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[14]A "Final 5.2 Order" (so-called on account of the paragraph number in the agreement that defined the term) was a final order determining that Continental would have no rights against Pacific for any asbestos-related defense or indemnity costs that Continental had, before the date of the Pacific II Agreement, neither agreed to pay (issuing a policy without more was not such an agreement) nor actually paid.

payable for asbestos property damage claims. Fibreboard Exh. 905. The Pacific II Agreement called for, and the parties executed, a rescission of all Pacific policies that might cover Fibreboard's asbestos claims. Fibreboard Exh. 906; Tr. at 188-91.

D. The Fibreboard Assignment Settlement Program and Related Litigation

75. In early 1991, Fibreboard believed it faced extreme circumstances that caused it to initiate a new settlement program. Tr. at 182. Confronted with the inability to settle large groups of cases through the SSP, Fibreboard faced major consolidated trials in Texas, Mississippi and Baltimore. Together with the exhaustion of defense monies under the Interim Agreement "caps," this led Fibreboard to initiate the assignment settlement program. Tr. at 182. Unlike the SSP, the terms of each assignment settlement were separately negotiated, and were not identical. Their basic structures were all very similar, however. In settlement of pre-1959 exposure cases, Fibreboard paid the claimants no cash at the time the settlement agreement was made, but rather granted an assignment of rights to proceeds under the Continental policy, together with any bad faith claims for Continental's failure to pay the assigned amount. If Fibreboard lost the Coverage Case, it was responsible to pay the entire settlement amounts. In post-1959 cases, claimants were given an SSP promise to pay. Tr. at 191-93; Continental Exh. 14. Plaintiffs who entered into assignment settlements demanded that Fibreboard obtain a judicial confirmation of Fibreboard's right to make the assignments. Tr. at 196.

76. Assignment settlements typically covered a law firm's entire caseload, but with provisions that addressed the possibility that certain claimants might reject the negotiated settlement. As it had done in the SSP settlements, under the assignment settlement program Fibreboard agreed to preserve its net worth and corporate resources, so that if it did lose the Coverage Case it could be liquidated for the benefit of asbestos claimants. Tr. at 193, 212-13; Continental Exh. 14.

77. Under the assignment settlement program, as was the case with the SSP before, nominal settlement values tended to increase again because, among other reasons (i) plaintiffs had to accept the increased risk that they would never be paid if Fibreboard lost the Coverage Case (they were receiving no cash, whereas under the SSP they had received 40% in cash); (ii) the assignments were of questionable validity under California law; and (iii) Continental now took the position that the assignment settlement program vitiated insurance coverage even if Fibreboard were to win the Coverage Case. Tr. at 195-96. The average settlement amount under the SSP held steady at roughly $5,400 per case; on the other hand, the assignment settlement average overall more than doubled, rising to over $11,400 per case. Tr. at 195-201; Fibreboard Exh. 919, Tabs 18-21. The weight of the assignment settlement program served to put pressure on Continental to engage in global settlement negotiations. Tr. at 608-09, 1082-84, 1177-78, 1325-28.

78. Continental strongly objected to the assignment settlements and office-wide settlements on several grounds, including that Fibreboard had no right to enter into them, that they breached the Interim Agreement provisions

calling for joint management of the cases and claim-by-claim evaluation of cases, and that they violated policy provisions prohibiting assignments of policy rights and settlements without Continental's consent. Continental also objected to the assignment settlements on the grounds that the settlement amounts were inflated and that pre-1959 (insured) claims bore a disproportionately high share of gross settlement amounts in each office-wide settlement agreement. Tr. at 195-96.

79. A broad, bitter and costly conflict ensued be- tween Fibreboard and Continental over the assignment program, and related issues. This conflict persisted through 1991 and 1992, and led to an agreement entered into on April 9, 1993 between Fibreboard and Continental, which has become known as the "April 9 Agreement." Fibreboard Exh. 908; Tr. at 1340-47.

80. In the conflict over the assignment settlement program, Continental took the position that the December 1988 "Interim Agreement" had redefined its policy obligations for the interim period, and that, if it complied with the Interim Agreement, it had provided all the defense that it was obligated to provide. Fibreboard took the position that an obligation to provide a full defense under the insurance policy still existed, that if payments under the Interim Agreement for defense were not adequate then Continental had not complied with its policy defense obligations leaving Fibreboard free to enter into settlements without Continental's consent, and that Fibreboard could do so by way of assignment of proceeds under the Continental policy. Tr. at 202-03.

81. Continental's objections began with the first assignment settlement, in the Cimino litigation. Continental Exh. 14; Fibreboard Exhs. 403, 500. Continental consistently objected to use of the assignment vehicle in all settlements, including the Brooklyn Navy Shipyard cases brought by the Levy, Phillips law firm (Fibreboard Exh. 407), the Weitz & Luxenberg cases (Fibreboard Exh. 409), and the Kazan cases (Fibreboard Exhs. 410, 411), among several others. Fibreboard Exhs. 406, 408, 416, 430, 431.

82. Continental asserted and continues to assert that the assignment settlement program not only violated various provisions of the Interim Agreement, but also the insurance policy itself, including provisions prohibiting assignment of interests under the policy, prohibiting settlements without Continental's consent, prohibiting action against Continental other than for declaratory relief, mandating cooperation, and prohibiting assumption of obligations. Fibreboard Exh. 412; Tr. at 202-04. Continental further asserted, and continues to assert, that Fibreboard's use of assignments had vitiated its coverage altogether, quite apart from the outcome of the Coverage Case. Tr. at 1515-17. Fibreboard adamantly rejected, and continues to disagree with, Continental's position in this regard, and asserts that Continental has no right to make any such claims. Tr. at 1545-46.

83. Several lawsuits were brought by Fibreboard against Continental to test whether Fibreboard legally could enter into settlements using the assignment mechanism. The first action, known as Andrus v. Fibreboard Corp., was filed by Fibreboard on April 1, 1991 in state court in

Alameda County, California, in connection with a proposed settlement of asbestos cases brought by Mr. Kazan's firm. Fibreboard Exhs. 303, 304.

84. On June 28, 1991, Continental filed an action in federal court in California, challenging the pending assignment settlement of the Cimino cases. Fibreboard Exhs. 305, 308. Eventually, that action was dismissed in favor of a third-party action filed in July 1991 by Fibreboard against Continental in Cimino seeking approval of the Cimino assignment settlement. Fibreboard Exhs. 306, 312, 313; Tr. at 206.

85. Fibreboard brought similar actions in federal court in New York to validate assignment settlements with claimants represented by the Levy, Phillips firm, and those represented by Weitz & Luxenberg. Fibreboard Exhs. 307, 311. Those matters were settled directly by Continental with claimants, immediately before trial or hearing, without a judicial determination as to the validity of the assignment vehicle, and, accordingly, Fibreboard's efforts to obtain an early ruling in its favor on the assignment issue did not succeed. Fibreboard Exhs. 310, 314; Tr. at 205-06.

86. Mr. Kazan did not settle the cases involved in the Andrus action directly with Continental. Fibreboard Exhs. 421, 422. On June 1, 1992, Judge Kawaichi of the Superior Court in Alameda County granted summary adjudication in Andrus in Fibreboard's favor, ruling that Fibreboard had the right to make reasonable settlements by way of assignment. Fibreboard Exh. 315. Judge Kawaichi reaffirmed that order on July 6, 1992, on Continental's motion

for reconsideration. Fibreboard Exh. 317. On September 2, 1992, the California Court of Appeal summarily rejected Continental's petition for writ of mandate, Fibreboard Exhs. 318, 321, and judgment in Andrus was entered in Fibreboard's favor in September 1992. Fibreboard Exh. 322; Tr. at 206-08.

87. On July 8, 1992, shortly after Judge Kawaichi reaffirmed the Andrus summary adjudication, Continental wrote Fibreboard stating that, notwithstanding the defense cap provisions in the Interim Agreement, Continental would provide a defense in accordance with applicable law. Fibreboard Exh. 435. Continental then reiterated its position that Fibreboard had no basis to make assignment settlements, given the position taken in the July 8 letter. Fibreboard Exh. 436. Fibreboard contended that Continental's offer to provide a full defense came too late. This new dispute provoked a series of correspondence, with each side arguing its contention, and with Fibreboard eventually taking the position in January 1993 that Continental could not remedy the situation created by its past failures to defend as long as Continental continued to reserve its coverage position. Fibreboard Exhs. 439-441, 446, 450, 452, 454, 468; Tr. at 234- 36.

88. The controversies between Continental and Fibreboard involved many areas in addition to Continental's objections to Fibreboard settling claims by way of assignments. Fibreboard contended that Continental refused to pay defense-related costs, such as those for a computerized case management system, a case processing center, and costs of negotiating assignment settlements. Fibreboard Exhs. 419, 434. Continental argued that Fibreboard's method for allocating amounts to individual cases based on duration of exposure, date

of first exposure, and disease (known as the "point system"), improperly weighted the settlement amounts in group or inventory settlements to pre-1959 cases. Fibreboard Exh. 410. Continental desired to attend settlement negotiations between Fibreboard's counsel and claimants' counsel; Fibreboard insisted on preconditions to such attendance. Fibreboard Exh. 413. When Continental developed its own settlement program, containing a 10% cash component, Fibreboard objected to that, Fibreboard Exhs. 437, 438, 442, 443, and to Continental's efforts to make settlement offers directly to claimants' counsel rather than through Fibreboard's counsel. Fibreboard Exhs. 415, 417. After Continental negotiated privately with counsel for the Cimino claimants, Fibreboard took the position that Continental had assumed full responsibility for all of those cases. Fibreboard Exh. 432. Continental's efforts to transform the settlement process into one in which it fully participated, by way of three-party agreements (that is, including Fibreboard, plaintiffs and Continental), led to contentions by Fibreboard that there was no agreed-upon three-party settlement structure, and Continental's assertion that there was. Fibreboard Exhs. 452, 457, 459, 460.

V. HISTORY OF GLOBAL SETTLEMENT NEGOTIATIONS

A. Early Global Negotiations (1990-1992)

89. A number of factors prompted Fibreboard to begin to explore the possibility of a global resolution of all of its asbestos injury liabilities in late 1990 and early 1991. Fibreboard was locked in a significant dispute with Continental and did not have enough money to defend itself. As a result, it entered into the Pacific I Agreement -- and, later, the Pacific II

Agreement -- to obtain funds. Tr. at 208-09. It then commenced the assignment settlement program in order to try to bring the underlying litigation closer to Continental, believing that it was important that Continental feel as threatened as Fibreboard did before Fibreboard would be able to receive some protection from Continental. Fibreboard wanted, in short, to get Continental interested in Fibreboard's entire asbestos problem. Fibreboard believed that in order to bring Continental to the bargaining table with respect to resolving all of Fibreboard's asbestos injury liabilities (pre-1959 and post-1959 claims), it was necessary to demonstrate progress toward assignment-based global settlement negotiations with the plaintiffs. Tr. at 209,633.

90. Other developments contributed to Fibreboard's interest in seeking a global resolution. Fibreboard was particularly motivated by the Linscomb action, filed in this Court in July of 1990 as a Rule 23(b)(1)(B) present and future claims class action, which had been widely discussed as a vehicle for "limited fund" treatment of certain defendants, including Fibreboard. Tr. at 210; Fitzpatrick Tr. at 86-87; Class Plaintiffs Exh. 1002; Fibreboard Exh. 117. At the 1990 Federal Judicial Center meeting at the Dolley Madison House in Washington, D.C., the message taken away by Fibreboard was that litigants should devise a solution to the asbestos problem, or the courts would impose a solution the litigants might not like. Tr. at 211; Fitzpatrick Tr. at 83-84. In September 1990, the Asbestos Ad Hoc Committee had been commissioned to report on the asbestos problem in the courts. In November 1990, eight federal judges had written a letter to the MDL Panel requesting transfer under 28 U.S.C. ¶1407 of federal asbestos cases to Judge Weiner. Fibreboard Exh. 118. All of these

developments stimulated Fibreboard's interest in global settlement discussions. Tr. at 208-11.

91. Fibreboard initially approached Mr. Motley of the Ness Motley firm to discuss a global settlement because he had been outspoken about the need for alternative approaches at the Dolley Madison House meeting, because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any global settlement, and because Ness Motley was involved in virtually all major trials against Fibreboard. Tr. at 211-12. Mr. Motley -- together with his partner at Ness Motley, Joseph F. Rice -- eventually agreed to consider a global settlement on an assignment basis. As proposed by Fibreboard, such a settlement would have the following elemental structure: if Fibreboard confirmed its coverage through a victory in the Coverage Case, plaintiffs would look only to Fibreboard's insurance assets for compensation, and not to Fibreboard's other (non-insurance) assets; if Fibreboard lost its coverage as the result of a loss in the Coverage Case, in contrast, plaintiffs could "have the company." Tr. at 212-13.

92. Fibreboard also approached Messrs. Kazan and Wartnick in late 1990 or in early 1991 suggesting that they consider a global settlement. Kazan and Wartnick were logical choices because they had the most information about Fibreboard's West Coast activity, and other asbestos plaintiffs' lawyers looked to them for guidance in the Fibreboard litigation. Fibreboard felt that negotiations would have credibility only if they, as experts on Fibreboard, were involved. Tr. at 213-14. Messrs. Kazan and Wartnick contacted Mr. Motley in the belief that Ness Motley would have to be

involved if any global settlement was to succeed. Tr. at 644-45.

93. Having decided to go forward with negotiations with Fibreboard with respect to an assignment-based global settlement of present and future claims, the Ness Motley lawyers and Messrs. Kazan and Wartnick ("Plaintiffs' Counsel")[15] took several steps to increase their negotiating effectiveness. They retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise. Tr. at 646, 1555-56. The primary lawyers at Caplin & Drysdale involved in this representation were Elihu Inselbuch and Peter Van N. Lockwood. Either Mr. Inselbuch or Mr. Lockwood or both were present at most of the discussions and negotiations described herein. Fibreboard Exhs. 505, 511; Tr. at 1382, 1450, 1466, 1550-51, 1555. Although Caplin & Drysdale at no time represented individual asbestos plaintiffs, that firm had had extensive experience in the asbestos field, including work in connection with the Manville bankruptcy and trust. Tr. at 1556. This Court finds that it was prudent and reasonable for Plaintiffs' Counsel to have retained them.

94. At the request of Plaintiffs' Counsel, Fibreboard supplied them with information about its past claims experiences, historical settlement averages, and financial

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[15]Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

information, on a confidential basis. Tr. at 215-16, 648; Fibreboard Exhs. 501-15.

95. In negotiating a potential global settlement, Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years or asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos, including sales records and other information. Tr. at 937-38. This Court finds that Plaintiffs' Counsel's extensive knowledge of Fibreboard and its operations was more than sufficient to permit them to negotiate effectively.

96. In 1991, Plaintiffs' Counsel retained James Sinclair, an investment banker, to provide an estimated value of Fibreboard absent its asbestos-related liabilities. Tr. at 648. Mr. Sinclair conducted an analysis and estimated such value of Fibreboard to be between $230 million and $240 million. Ortiz Exh. 1.

97. Plaintiffs' Counsel also retained Dr. William Nicholson, a prominent and distinguished epidemiologist at Mount Sinai Hospital in New York, to provide them with a projection of the number of future asbestos-related claims against Fibreboard. Tr. at 216, 648, 836-39, 849. Dr. Nicholson is the author (together with Drs. Selikoff and Perkel) of a 1982 study entitled "Occupational Exposure to Asbestos:

Population at Risk and Projected Mortality, 1980- 2030," which estimated the population that had been exposed to asbestos (of all manufacturers) in the past, and the number of resulting cancer cases from 1980 onward. Tr. at 839-49; Class Plaintiffs Exh. 1011. Dr. Nicholson's work in the field of future asbestos claims projections has been among the most accurate work done to date. Tr. at 648-49.

98. At the request of Plaintiffs' Counsel, Dr. Nicholson was provided with data from Fibreboard concerning number of claims against Fibreboard per year by industry; time of claimant's first employment; duration of claimant's employment; age of claimant; and type of claimant's disease. To the extent that gaps were found to exist in this database, Dr. Nicholson sought to fill those gaps with information gathered in connection with the Manville proceedings. Tr. at 216, 850- 51. Using this data, together with the results of this 1982 study, Dr. Nicholson made an estimate of the number of future claims against Fibreboard. The estimate, taking into account the uncertainty acknowledged by Dr. Nicholson, provided a range of just over 120,000 claims to just under 190,000 claims for the period beginning in September 1993 and continuing through 2029. Tr. at 851-58; Class Plaintiffs Exhs. 1010, 1012, 1018.

99. Dr. Nicholson's work was done in 1991. However, he reexamined his work during 1993 when projections by others were published in connection with the Manville trust litigation, and he reaffirmed the validity of his analyses and conclusions in August 1993. Tr. at 861-65. As Dr. Nicholson explained, mesothelioma projections among those exposed to Fibreboard asbestos logically peaked earlier in time and fell off faster than projections for persons exposed to

Manville products because of the different asbestos exposure patterns created by the different products of the two entities. Exposure to Fibreboard products was more common in shipyards during World War II, Tr. at 861-63, whereas Manville products were more broadly used over a wider period of time. It is thus inappropriate to compare Manville claims projections with Fibreboard claims projections. Tr. at 863.

100. Based on Dr. Nicholson's methodology, the his- torical accuracy of his work in the field of future asbestos claims projections, and his exemplary reputation in his field, the Court finds that it was prudent for Plaintiffs' Counsel to have retained Dr. Nicholson, and reasonable for them to have relied on his projections in their subsequent global settlement negotiations.

101. In 1990 and 1991, some of Plaintiffs' Counsel (together with other lawyers acting for asbestos claimants) had engaged in global negotiations with representatives of many asbestos defendants under the aegis of the Linscomb global class action pending in this Court. Fitzpatrick Tr. at 87-89. While those global negotiations never reached closure, a consensus among members of the plaintiffs' bar developed about overall average settlement values for each asbestos-related disease and the respective settlement shares of the various asbestos defendants. This consensus was taken into consideration by Plaintiffs' Counsel in their negotiations with Fibreboard. Tr. at 650-51, 1129-36.

102. Based upon their own broad experience, which included the SSP and assignment settlement program negotiations, the Linscomb negotiations, and the estimates from

Mr. Sinclair and Dr. Nicholson, Plaintiffs' Counsel formulated a negotiating position with respect to an assignment-based global settlement. To do so, Plaintiffs' Counsel needed to estimate the number of future asbestos claims against Fibreboard, the value of those claims, as well as the proportion of claims representing pre-1959 and post-1959 exposures. The work that had been done in connection with the Linscomb action provided appropriate national average settlement values for various diseases. And Fibreboard's share from time to time of the national averages could be derived from ACF data and knowledge of the asbestos litigation. This information provided a reasonable basis for Plaintiffs' Counsel to use in global negotiations. Tr. at 650-52.

103. Prior to and during global negotiations, Plaintiffs' Counsel kept themselves informed of developments in the Coverage Case by obtaining and reviewing, inter alia, copies of the trial court's tentative decisions, the trial court's judgment, and the briefs submitted to the California Court of Appeal. Tr. at 643-44; Fibreboard Exh. 500.

104. In addition, later in the negotiating process the Ness Motley lawyers retained and consulted with Professor Samuel Dash with respect to ethical issues. Tr. at 1551-53.

105. This Court finds that Plaintiffs' Counsel correctly identified those areas in which outside assistance would help them to negotiate a global settlement more effectively on behalf of asbestos claimants, and that they took appropriate steps to obtain such outside assistance. In addition, this Court finds that Plaintiffs' Counsel took the

necessary and proper steps to inform themselves of the pertinent facts and law so as to be able to formulate an effective negotiating position and to carry out their professional responsibilities in accord with the ethical standards governing attorneys. Tr. at 412-13.

106. Fibreboard asked that Plaintiffs' Counsel keep their colleagues in the plaintiffs' bar informed about global settlement discussions, and reiterated that Fibreboard would not pay any non-insurance resources in settlement if it prevailed in the Coverage Case. Tr. at 215.

107. Continental was informed early in the global negotiation process, and objected to a global settlement by way of assignment, as it had objected to any settlements by way of assignments. Tr. at 216-17.

108. Because Continental was not at the table, Plaintiffs' Counsel developed the strategy of first establishing a ration between the present value of the total settlement amounts for pre-1959 (insured) and post-1959 (uninsured) claims. To do so they separately calculated the data for different periods of exposure, types of exposure, and settlement shares, so that it could be matched with Dr. Nicholson's projections respecting the number and types of future cases anticipated to be filed against Fibreboard. They then took the position that they would first negotiate only the post-1959 settlement price with Fibreboard, and that they then would use their predetermined ratio to derive the settlement price for the pre-1959 claims to avoid any argument by Continental that Fibreboard had, in effect made Continental (which would have responsibility for insured claims) pay for uninsured claims, which were Fibreboard's

responsibility. Fibreboard would retain liability for all amounts if the Coverage Case failed. Tr. at 217-18, 650-53.

109. The 1991-1992 global negotiations were conducted with respect to all present and future asbestos-related personal injury cases against Fibreboard. The parties negoiated in contemplation of a Rule 23(b)(3) opt-out class action structure. Given a choice, Plaintiffs' Counsel preferred an opt-out settlement class structure, and felt it would be easier to support legally. Plaintiffs' Counsel rejected Fibreboard's suggestions for total or partial mandatory class treatment (of e.g. punitive damages claims). Tr. at 218, 649.

110. Negotiations progressed to the point where the parties apparently had reached agreement on price terms of $278 million for the post-1959 cases, and $1.86 billion for the pre-1959 cases. These prices would have covered both present and future cases. The parties exchanged draft term sheets in November 1991. Fibreboard Exhs. 528-530. Fibreboard intended to pay the post-1959 settlement price with money to be derived from the Pacific I Agreement, together with credits to be received from Continental under the Interim Agreement, from some remaining AIG and Home Insurance Company settlement monies, and from recovery of unpaid defense costs from Continental. Tr. at 219-20.

111. Difficulties arose, however, in resolving questions about opt-outs and contribution and indemnity issues, Tr. at 226-28, and Plaintiffs' Counsel eventually took the position in December 1991 that negotiations were terminated. Fibreboard Exhs. 531, 532; Tr. at 228-30. Further attempts in 1992 to reach agreement on the terms of a global settlement

were unavailing, with issues as to how to handle opt-outs and contribution and indemnity claims continuing to present major difficulties. Tr. at 230; Fibreboard Exhs. 533-536, 543-545.

112. Continental was kept informed of the global negotiations, and stated its objections to Fibreboard's assignment-based global settlement negotiations. Tr. at 216-17; Fibreboard Exhs. 404, 423. Continental expressed its desire to negotiate directly with representatives of the claimants, Fibreboard Exhs. 516, 518; Tr. at 223, and attempted to participate in negotiations, but Plaintiffs' Counsel insisted on negotiating with Fibreboard so long as there was a coverage dispute. Fibreboard Exh. 519. Continental sought inclusion in the global negotiations, suggesting the possibility of a resolution subject to the final decision in the Coverage Case. Fibreboard Exhs. 522, 523.

113. In March 1992, Continental suggested a $1.5 billion settlement limited to pre-1959 claims (present and future), to be paid $100 million a year over 15 years. Other than $20 million payable yearly during the remainder of the Coverage Case, the Continental offer was subject to the outcome of that litigation. Fibreboard Exh. 539. Fibreboard objected to what it asserted was an improper attempt by Continental to address only part of the company's asbestos litigation problem, Fibreboard Exh. 541, and there were no substantial discussions of the proposal. Tr. at 228-29.

114. There had also been efforts in April and May 1992, initiated by Fibreboard, to find a way, satisfactory to both Fibreboard and Continental, to proceed with global negotiations with Plaintiffs' Counsel. Proposals included

Continental paying Fibreboard an amount of money to take responsibility for the entire asbestos problem, or Fibreboard turning over to Continental all its insurance, with Continental to assume responsibility for the entire problem. Fibreboard Exh. 424. These efforts were unavailing. Fibreboard Exhs. 425, 428, 429.

B. The Initial Ness Motley Agreement

115. In May 1992, when global negotiations had stalled, Fibreboard expressed an interest in settling all of the Ness Motley firm's asbestos cases. Tr. at 301, 1075. Mr. Snyder approached Messrs. Rice and Cox, who entered into negotiations for Ness Motley clients and on behalf of Ness Motley affiliate law firms across the country. The cases involved presented the broad range of asbestos-related diseases. Tr. at 301-03, 1076-78. These negotiations continued through the remainder of 1992. Tr. at 1076-84.

116. An agreement, now known as the "Initial Ness Motley Agreement," was signed December 30, 1992. Fibreboard Exh. 917. It covered 20,000 cases, at an average price of $13,000 per case, with provisions for adding more cases. It incorporated the point system, and was based on an assignment of rights under the Continental policy with respect to pre-1959 claims. Post-1959 claims were to be paid with monies derived from the Pacific II Agreement, and thus the Initial Ness Motley Agreement contained a provision requiring Fibreboard to obtain a Final 5.2 Order. With the Initial Ness Motley Agreement, by January 1993 Fibreboard had settlement agreements in place involving debt to asbestos bodily injury

claimants of over $1.2 billion, including $943 million in assignment settlements made in 1992. Tr. at 230-31.

C. Negotiations During 1993

1. Early 1993 To April 9, 1993

117. The Initial Ness Motley Agreement required that Fibreboard obtain Continental's assent to the assignment underlying it, or a court order approving that assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, Fibreboard Corp. v. Continental Casualty Co., Civil Action No. 6:93cv11 (E.D.Tex.), seeking (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Tr. at 232-33, 1327; Continental Exh. 22. Such a bar order was simultaneously sought by Fibreboard against Continental in state court in Alameda County, California. Continental Exh. 23.

118. In February 1993, Continental responded to this litigation by moving to dismiss or stay the action before this Court under the Declaratory Judgment Act (based on the pendency of the Alameda County action), and by moving to dismiss under Fed. R. Civ. P. 12 for failure to join Pacific as a party. In the Alameda County action, Continental cross-complained against Fibreboard for a declaratory judgment that

Fibreboard's assignment of rights under the Continental policy and its seeking a contribution bar order constituted breaches of the policy. Fibreboard thereafter responded, resisting the relief sought by Continental. Continental Exhs. 22, 23.

119. In early 1993, Continental made a corporate decision to determine whether it would be possible to achieve a global resolution of its entire Fibreboard asbestos-related liability. Tr. at 1330. In connection with this decision, on February 8, 1993, Continental's parent, CNA Financial Corporation, publicly announced that Continental would be seeking to discuss such a global settlement with Fibreboard, and that Continental was increasing its asbestos-related reserves by $1.5 billion. Tr. at 1330-31; Fibreboard Exh. 552. Fibreboard, in response, stated that it was "pleased that CNA has publicly acknowledged the order of magnitude of its potential liability arising from prior trial court judgments in Fibre- boards's favor. Fibreboard has been and remains ready to engage in good faith settlement negotiations with Continental." Continental Exh. 15.

120. At a status conference before this Court on March 10, 1993, at which representatives of Fibreboard, Con- tinental and Ness Motley were present, the Court and the par- ties discussed the possible appointment of a Settlement Facilitator. Tr. at 307-08, 1092-93.

121. On March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in connection with the litigation pending in this Court between Fibreboard and Continental. Tr. at 1093, 1332; Fibreboard Exh. 559.

122. Judge Higginbotham, by letter dated March 25, 1993, asked the parties for letters setting forth the status of the matter and the parties' respective positions preparatory to a series of meetings before him. Fibreboard Exh. 560. Fibreboard and Continental responded with such letters. Fibreboard Exhs. 561, 562.

123. As set forth in its letter to Judge Higginbotham, Fibreboard stated its views that: (i) Fibreboard and Continental should focus their attention on resolving the issues raised in Fibreboard's pending litigation in this Court; (ii) Continental should agree to the terms of the Initial Ness Motley Agreement; (iii) to the extent that there were discrete aspects of Fibreboard's litigation in this Court on which agreement between Fibreboard and Continental could not be reached -- for example, Fibreboard's prayer for a contribution bar order -- then such disputed aspects should be adjudicated by the Court on an expedited basis; and (iv) Continental should not be permitted to become involved in negotiations between Fibreboard and Plaintiffs' Counsel toward a global resolution of all of Fibreboard's present and future asbestos personal injury liabilities -- negotiations that Fibreboard said were nearing a successful conclusion -- unless Fibreboard received assurances from Continental that Continental's participation in such negotiations would not cause delay, interference or prejudice to Fibreboard. Fibreboard Exh. 562.

124. Continental's understanding was that the focus of the settlement effort was intended to be an attempt to achieve a global settlement. Tr. at 1332-33. As set forth in Continental's letter to Judge Higginbotham, Continental believed that there were several major obstacles to a global settlement

with Fibreboard, namely: (i) the Pacific II Agreement, whereby the parties to that agreement agreed to rescind the Pacific policy with the purported effect of extinguishing Continental's right to contribution from Pacific, in exchange for a payment by Pacific to Fibreboard of up to $360 million; (ii) Fibreboard's assignment settlement program, including the threat of a global resolution of Fibreboard's asbestos liabilities by means of an assignment settlement be- tween Fibreboard and Plaintiffs' Counsel without Continental's consent; (iii) obstructed communication between Continental and representatives of asbestos claimants, which Continental claimed prevented it from participating at the bargaining table; and (iv) alleged interference by Fibreboard with Continental's ability to acquire information regarding asbestos claimants asserting claims against Fibreboard. Tr. at 1333-34; Fibreboard Exh. 561.

125. Continental was also of the view in March 1993 that any global settlement with Fibreboard had to be structured as a non-opt-out class action settlement. This was a sine qua non for Continental, for several reasons. First, structuring the settlement on an opt-out basis could give the asbestos plaintiffs the equivalent of a "one-way option," in that if the Insurers were successful in the Coverage Case appeal there would likely be virtually no opt-outs from the settlement, whereas if Fibreboard were successful in the same appeal there might be a large number of opt-outs. Tr. at 1334-35. This analysis was predicated on an assessment that the likely time of decision by the California Court of Appeal in the Coverage Case would be before any date where one could anticipate that a plaintiff class would be given the right to decide whether or not to opt out of the settlement. Tr. at 1335-36.

126. Second, Continental was not willing to contribute the major portion of a multi-billion dollar settlement and give up its right to continue litigating the Coverage Case appeal -- and thereby perhaps eliminate any liability to Fibreboard -- unless it could thereby achieve certainty with respect to the magnitude of its liabilities under the insurance policy it had issued to Fibreboard. Continental thus regularly insisted that any global settlement provide it with "total peace" with respect to asbestos-related liability. Continental did not believe that it could make an accurate assessment of the ultimate liability that would be associated with those class members who would choose to opt out of a future-claimants asbestos class action such as that being contemplated.[16] The contemplated class action differed in this regard from most class actions -- such as securities fraud class actions -- where the defendant can determine with reasonable accuracy at the outset the potential value of the opted-out claims. Tr. at 324, 1336-38, 1569-72.

127. For their part, Messrs. Rice and Cox were of the view that Fibreboard and Continental had to reach an agreement resolving the differences between them before Con- tinental should be permitted to participate in global settlement negotiations with Plaintiffs' Counsel. Tr. at 1097-98. In an April 5, 1993 letter to Fibreboard's counsel, Mr. Cox stated two preconditions to Plaintiffs' Counsel's entering into global settlement negotiations. First, Mr. Cox was to be provided with a copoy of any written Fibreboard-Continental agreement that

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[16]While experts can assess -- although with uncertainty -- the value of a broad mix of future claims based on diseases that become manifest over a long period of time, there is little or no basis on which to predict which types of claims -- more serious than average, less serious than average, or simply average -- will be presented by those individuals who might choose to opt out.

was reached, no later than April 9, 1993. And second, Continental was to advise Plaintiffs' Counsel that Continental had sufficient information to commence global negotiations. Mr. Cox further emphasized that, in his view, the original, primary focus of the negotiations before Judge Hig- ginbotham was with respect to a settlement of the Ness Motley cases. Fibreboard Exh. 563.

128. Fibreboard and Continental then engaged in extremely hard-fought, arm's-length, contentious negotiations that led to an agreement between them on April 9, 1993 (the "April 9 Agreement"). Tr. at 308-10, 1340, 1349; Fibreboard Exhs. 566, 908. Fibreboard believed that it had the right to enter into assignment settlements without Continental's consent. Plaintiffs' Counsel had agreed in principle to enter into a global settlement with Fibreboard funded by an assignment of rights against Continental and the proceeds of its settlement with Pacific. Fibreboard was thus unwilling to give up this position unless Continental agreed that it could only enter into a global settlement that would not require contribution of any of Fibreboard's non-insurance assets. Tr. at 309-12.

129. The April 9 Agreement provided, inter alia, that the parties would use their best efforts to achieve a global resolution of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos personal injury claims.[17] In addition, Continental agreed that it

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[17]The April 9 Agreement expressly provided, however, that the "best efforts" clause in the agreement did not "obligate Continental to pay or obligate itself with respect to any particular amount or amounts of money or to agree to any particular term or terms in order to achieve" such a global resolution. (continued...)

would not seek to reach a global settlement without Fibreboard's participation, and that any global settlement Continental did conclude with Fibreboard would be funded entirely within Fibreboard's available insurance resources. Tr. at 309-312, 1345-49; Fibreboard Exh. 908. Such a provision -- excluding Fibreboard's non-insurance assets from any global settlement -- had been Fibreboard's corporate goal for many years and continued to be a sine qua non for Fibreboard. Tr. at 144, 1349, 1588-89. Continental also agreed to pay the monies that Pacific had agreed to pay under the Pacific II Agreement under the same conditions and as if a Final 5.2 Order had been entered. This meant that if Continental were successful in voiding the Pacific II Agreement, Continental would nonetheless stand behind the monetary obligations of that agreement. Tr. at 310; Fibreboard Exh. 908 at ¶ 6(b).

130. The April 9 Agreement achieved several important purposes for Continental. First, it prevented Fibreboard from entering into any settlements -- including any further assignment settlements -- without Continental's consent. Second, Continental obtained direct access to global negotiations with Plaintiffs' Counsel. In addition, Continental obtained certain releases from Fibreboard, including a release with respect to asbestos property damage claims. Tr. at 1344; Fibreboard Exh. 908.

131. In the April 9 Agreement, Fibreboard obtained a number of important commitments from Continental: (i) most important, an undertaking -- which Fibreboard viewed

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[17](...continued)
Fibreboard Exh. 908 at 1, ¶ 1.

136. On the morning of April 30th, Continental made a global settlement offer to Plaintiffs' Counsel to settle all of Fibreboard's present and future asbestos personal injury claims for $2 billion face amount, to be paid over 25 years. The offer continued to be conditioned upon the settlement being structured on a non-opt-out basis, as well as an adequate contribution from Pacific. Plaintiffs' Counsel briefly considered this offer among themselves and then returned to the negotiating room, stating that they believed that they had been presented with a "take-it-or-leave-it" offer, and that they would leave it. Plaintiffs' Counsel then walked out of the meeting. Tr. at 314-16, 1100, 1352-56.

137. For a period of time thereafter, Plaintiffs' Counsel took the position that the global settlement negotiations had terminated, that the only issue for discussion was the resolution of the Ness Motley litigation, and that Judge Higginbotham's role was limited to assisting in that resolu- tion. Continental and Fibreboard took the position that global negotiations were not over, and the Judge Higginbotham should encourage the parties to continue global negotiations. Tr. at 317-19, 1101-02, 1356-57, 1538; Fibreboard Exhs. 567, 572, 574-576.

138. Judge Higginbotham convened a meeting on May 5, 1993 in New Orleans attended by Fibreboard, Continental, Pa- cific and Messrs. Rice and Cox. At that meeting, Continental urged strongly that global negotiations be continued. Mr. Rice continued to insist that global negotiations were over, as long as Continental continued to insist -- as it did at that meeting -- that any global settlement be done on a non-opt-out basis, and that there be an adequate financial

contribution from Pacific. Pacific continued to state that the Pacific II Agreement resolved its Fibreboard asbestos- related liabilities. Nevertheless, Judge Higginbotham directed Continental and Messrs. Rice and Cox to set forth in writing their positions with respect to the structure of a global settlement (opt-out or non-opt-out) and the price of any such settlement. Continental and Messrs. Rice and Cox did so, in letters dated May 12, 1993 and May 17, 1993, respectively. Tr. at 1355-58, 1370, 1538; Fibreboard Exhs. 568, 574.

139. Judge Higginbotham convened another meeting in Washington, D.C., on May 17, 1993. Following their meeting with Judge Higginbotham, Continental, Fibreboard and Messrs. Rice and Cox met to discuss a resolution of the litigation concerning the Initial Ness Motley Agreement. Although Messrs. Rice and Cox took the position that formal global negotiations had ceased, and that they had no authority to negotiate on behalf of Messrs. Kazan and Wartnick, Continental and Fibreboard continued to seek to restart global negotiations, and Mr. Wachtell indicated that he would be willing to recommend to Continental a global price higher than that offered to Plaintiffs' Counsel on April 30. Tr. at 320, 1101-03, 1373-74. The global settlement being discussed continued to assume a settlement of both present and future claims. Tr. at 324-25, 1399-1400.

140. In late May 1993, during the course of nego- tiations concerning a settlement of the Ness Motley cases, informal meetings took place among Fibreboard, Continental and Messrs. Rice and Cox in an effort to find a way to make progress on a global settlement. No avenue for progress was found. As a consequence, representatives of Continental and

as enforceable in court -- that Continental would use its best efforts to accomplish a settlement of all of Fibreboard's asbestos-related personal injury liabilities, pre-1959, post- 1959, settled, present, and future, within Fibreboard's remaining insurance resources; (ii) Continental's agreement to provide a full defense for pre-1959 cases and to pay indemnity and defense costs up to a specified limit ($95 million) for post-1959 cases; (iii) an undertaking by Continental to pay the monies Pacific had agreed to pay in Pacific II, as if a Final 5.2 Order had been entered; and (iv) a release of certain claims. Tr. at 309-12, 1344-49; Fibreboard Exh. 908.

132. Attempts by Continental during this period of time to enlist Pacific's agreement to participate in negotiations were unsuccessful. Pacific was of the view that it had entered into a binding agreement with Fibreboard that, upon entry of the court order being sought by Fibreboard in the action in this Court, would resolve its Fibreboard asbestos- related liability. Accordingly, Pacific rejected Judge Higginbotham's suggestion that it participate in global settlement negotiations. Tr. at 1349-50.

2. April 9, 1993 to August 9, 1993

133. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and once having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Continental's rights to equitable contribution against Pacific were unaffected by the Pacific II Agreement. Continental Casualty Co. v. Pacific Indemnity Co. and Fibreboard Corp., Civil Action No. 6:93cv

223 (E.D. Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement. Tr. at 1350; Fibreboard Exh. 329; Continental Exh.24.

134. On April 27, 1993, the California Court of Appeal notified the parties to the Coverage Case appeal that oral argument had been scheduled for June 11, 1993, with respect to a discrete group of appellate issues. The notice indicated that oral argument upon the Coverage Case appeal would be conducted in several "issue groups" (each dealing with a different group of appellate issues). The notice gave no indication, however, as to the schedule for completing the additional rounds of oral argument. Fibreboard Exh. 243. Indeed, the first notice was followed in short order by further notices from the Court of Appeal scheduling additional rounds of oral argument on the Coverage Case appeal. Continental Exh. 32; Fibreboard Exhs. 247, 248.

135. Having met the preconditions set forth in Mr. Cox's letter of April 5, Fibreboard Exh. 563, on April 29 and 30, 1993 discussions concerning a global settlement were held in Washington D.C. among Continental, Fibreboard, and Plaintiffs' Counsel. On the 29th, Herbert M. Wachtell, counsel for Continental, set forth Continental's negotiating positions, including its positions that any settlement must be on a mandatory non-opt-out basis, and that a prerequisite to any global settlement was an acceptable level of contribution from Pacific. Plaintiffs' Counsel rejected both of these positions, and insisted that Continental put a concrete economic proposal on the table. Tr. at 314, 1099-1100, 1352, 1355.

Fibreboard began discussions during June 1993 regarding the possibility of the two parties entering into a "bilateral" settlement of the insurance coverage dispute without the participation of Plaintiffs' Counsel. Several meetings were held between Continental and Fibreboard during June toward that end. By the end of June it was apparent that Fibreboard and Continental would not be able to reach such an agreement, with key issues such as price and Continental's demand of an acceptable contribution from Pacific unresolved. Tr. at 316- 17, 1375-79.

141. On June 15, 1993, representatives of Continental met with all of Plaintiffs' Counsel, including Messrs. Kazan and Wartnick, at the Caplin & Drysdale offices in Washington, D.C. Continental explained again why any global settlement would have to be structured as a non-opt-out deal that would provide Continental with certainty as to the cost of the deal at the outset. Plaintiffs' Counsel stated that they required a clearer indication of what Continental would be willing to pay in the early years of a settlement. Continental stated that it could be somewhat more flexible on price. Plaintiffs' Counsel conferred among themselves, and then -- having concluded that, for persuasive reasons, Continental simply would not proceed on an opt-out basis -- informed Continental that they would be willing to consider a Rule 23(b)(1)(B) global class action settlement if Continental could articulate the legal basis for such a structure, and on the understanding that the global settlement would cost Continental more if done on a non-opt-out basis. Plaintiffs' Counsel left Continental's representatives with a list of questions to which they would require responses. Tr. at 392-93, 657-58, 1125-27, 1381-84, 1392-93, 1444-50, 1572; Class Plaintiffs Exh. 1015 at

1-2. Again the contemplation of the discussion was a global settlement of both present and future claims. Tr. at 324-25, 393, 1399-1400.

142. During June and July 1993, negotiations with respect to the Ness Motley cases continued among representa- tives of Continental, Fibreboard, and Ness Motley. Tr. at 1103-05. Mr. Rice insisted on a settlement price of $13,000 per pre-1959 claim. Tr. at 1394-95.

143. Notwithstanding the April 9 Agreement between Continental and Fibreboard, Fibreboard was still contractually obligated to procure a court order validating its right to enter into assignment settlements, and Continental faced the prospect that such an adjudication would require it to pay out on assignment agreements at case values it considered to be markedly inflated. Therefore, Continental desired to renegotiate these agreements as three-party deals, and Fibreboard and Continental created a national settlement program to do so. Tr. at 312-13, 1395-96.

144. Under that settlement program, representatives of Fibreboard and Continental met with various plaintiffs' counsel across the country with whom Fibreboard had entered into assignment settlements without Continental's consent, and jointly sought to convert the assignment settlements into "three-party" settlements to which Continental was a party. As part of the national program, Continental and Fibreboard also met with plaintiffs' counsel who had no assignment settlements in an effort to settle their cases as well. Tr. at 1395-97. All such contemplated three-party settlements involved payment of part of the settlement in cash, with the

balance contingent on either a settlement of the Coverage Case or a litigated loss of the Coverage Case by Continental. Tr. at 321, 1395-96, 1408-09. Ultimately, the renegotiated settlements reflected lower nominal values than the assignment agreements they replaced due to the cash component. Even so, the assignment program invariably resulted in renegotiated values that were still higher than Fibreboard's historical settlement averages. Tr. at 321-23, 522, 633, 931-32, 1082- 84, 1102-05.

145. During the course of this settlement program it became apparent that other plaintiffs' counsel were reluctant to enter into three-party settlements without an established standard for such a settlement, lest they find that they had entered into a less advantageous settlement for their clients. Accordingly, the conclusion of a three-party settlement of the Ness Motley cases came to be viewed as essential to concluding other three-party settlements because it could provide an acceptable benchmark. Tr. at 1396-97.

146. By early July the parties to the Ness Motley negotiations were close to agreement on price, as well as the size of the cash component. The balance would be contingent on either a settlement of the Coverage Case or a loss by Continental of the Coverage Case. Tr. at 1128, 1398.

147. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Conti- nental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering both present and future cases appeared too complex to negotiate. Tr. at 324-25, 1659-61. Accordingly, he suggested

that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases -- which could serve as the model for settling the presently pending Fibreboard cases -- should precede further global negotiations. Tr. at 1398- 1400.

148. In late July 1993 the parties to the Coverage Case appeal were informed by the California Court of Appeal that oral argument upon the final issue group of the appeal had been scheduled by that court for August 27, 1993. Tr. at 329, 1400-01; Fibreboard Exh. 248. The parties to the appeal (and, through them, Plaintiffs' Counsel) thus knew that the appeal would be finally submitted to the court for decision on that date. Indeed, the belief was held among at least some of the parties to the global negotiations that the court might issue its decision immediately following the conclusion of oral argument. Tr. at 329.[18]

149. The parties had agreed on July 13 that the appropriate way to proceed was to conclude the renegotiation of the Initial Ness Motley Agreement as a three-party agreement, and that this process had to take precedence over continued negotiation of a global settlement. Although Continental had been somewhat successful in slowing down the course of the Fibreboard v. Continental litigation in this Court, Messrs, Rice and Cox were actively seeking to have it proceed to trial promptly (as was Fibreboard, which was contractually bound to join them in that effort). Thus Continental faced the

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[18] In any event, provisions of the California State consti-tution made it highly likely that the California Court of Appeal would issue its decision within 90 days following the August 27 oral argument. Constitution of the State of California, Art. VI, § 19.

very real prospect the trial would go forward promptly if no three-party settlement of the Ness Motley cases were reached. However, Continental deemed it tactically very undesirable to challenge the Final 5.2 Order being sought by Fibreboard -- which order had been structured in the Initial Ness Motley Agreement to bar not only contribution claims with respect to Ness Motley cases but as to all asbestos claims -- in a context where such an order was a condition precedent to a settlement of over 20,000 asbestos cases. Tr. at 1386-87, 1400-06.

150. Moreover, Continental had decided that as long as Pacific had the prospect of obtaining approval of a bar order against Continental at a cost of only $330 million, there was no realistic possibility of bringing Pacific to the bargaining table to bear what Continental felt was Pacific's fair share of a global settlement. Accordingly, Continental concluded that the only way to reach a global settlement and avoid a very damaging loss in Fibreboard v. Continental was to negotiate first a new settlement of the Ness Motley cases. Tr. at 1350, 1385-87, 1400-07.

151. With the continued active assistance of Judge Higginbotham, and after hard-fought, arm's length negotiations, on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related personal injury claims against Fibreboard. Tr. at 321-23, 1128-29, 1402-04; Fibreboard Exh. 586.

152. The Substitute Ness Motley Agreement, compared to the Initial Ness Motley Agreement, reflected a reduction in the per-claimant settlement amounts, an increase in the number of cases settled, and the modification of numerous other pro- visions of the original agreement. The Substitute Ness Motley Agreement also provided for counsel participating in the agreement to recommend to their future asbestos clients an offer to settle their claims against Fibreboard on the same terms as those offered to settle present claims. The Substitute Ness Motley Agreement did not obligate any future claimants to accept those settlement terms and expressly provided for the full representation by Ness Motley of any person who rejected those settlement terms. In addition, Fibreboard and Continental were not required to offer those terms if more than a certain percentage of the Ness Motley future claimants elected to reject the terms. Tr. at 321-33, 1402; Fibreboard Exh. 909.

153. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval. Tr. at 1407, 1413; Fibreboard Exh. 588.

3. August 9, 1993 to August 27, 1993

154. After the conclusion of the Substitute Ness Motley Agreement, Judge Higginbotham addressed a letter to this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider

directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." Fibreboard Exh. 586.

155. By statement on the record on August 9, and a formal order of August 11, 1993, this Court appointed Plain- tiffs' Counsel to act as negotiating counsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Fibreboard Exhs. 588, 589. The negotiating parties did not in any way deem themselves to be bound in this respect and, indeed, in negotiations subsequent thereto active consideration was given to agreeing upon a combined global settlement of both present and future claims. Tr. at 325, 1426-27.

156. Although Messrs. Kazan and Wartnick were orally designated by this Court to participate in the global settlement negotiations under the condition that they first notify the Court that all of their existing claims against Fibreboard had been resolved, the Court's formal order contained no such condition. This appointment included, in addition to Plaintiffs' Counsel, Mr. Robert E. Sweeney, Esq. Tr. at 1407-12; Fibreboard Exhs. 588, 590.

157. Immediately upon the signing of the Substitute Ness Motley Agreement, Continental requested that Continental v. Pacific and Fibreboard be set for trial as soon as possible. Now that it could be separated from the issues that would have been involved in litigating the approval of the Initial Ness Motley Agreement, Continental was willing to have the

issue of the validity of a Final 5.2 Order decided. Moreover, Continental wanted an immediate trial of its case so that Pacific would be motivated to join the negotiations before the California Court of Appeal rendered a decision in the Coverage Case. Fibreboard Exh. 588.

158. At the same time, this Court requested Judge Higginbotham to continue to serve as Settlement Facilitator (i) with respect to the pending Continental v. Pacific and Fibreboard litigation; and (ii) if Judge Higginbotham were agreeable, with respect to the negotiations for a global future claims-only settlement. Fibreboard Exh. 588.

159. Continental, Fibreboard and all of Plaintiffs' Counsel met later on the evening of August 9, 1993 at the Adolphus Hotel in Dallas, and intensive meetings continued through August 12, 1993. Although the parties present at those meetings did reach an agreement to use a negotiating benchmark of 186,000 future claims against Fibreboard, these meetings produced no price agreement because price negotiations were difficult, given Continental's position that any settlement would require an "acceptable" level of contribution from Pacific, and Plaintiffs' Counsel's unwillingness to enter into such a contingent settlement. The negotiations for a global settlement during those meetings were not limited to a future claims-only deal, but continued to contemplate a global that would include all claims, both present and future. Indeed, the negotiations concluded with an offer by Plaintiffs' Counsel to price three different settlement alternatives: an all-inclusive global settlement, a settlement of unsettled present and all future claims, or a future claims-only global settlement. Tr. at 984, 1184-85, 1414-20.

160. During the Spring and Summer of 1993, at the same time that Plaintiff's Counsel were in intense discussions with Fibreboard and the Insurers, they and other representa- tives of asbestos victims were involved in resolving the fi- nancial difficulties facing the Manville trust. As part of the Manville negotiations, which involved dozens, if not hundreds, or lawyers across the country representing asbestos claimants as well as the Manville trust and other asbestos defendants, the participants developed what they considered to be fair values for the Manville settlement share of claims against that trust. The claims values thus developed for the Manville trust were congruent with the values developed by Plaintiffs' Counsel in Linscomb. Tr. at 1130-33.

161. The average settlement values for the Manville settlement share by disease developed in 1993 were as follows:

Mesothelioma	$200,000
Lung Cancer	$75,000
Other Cancers	$40,000
Asbestosis	$37,500
Pleural Disease	$12,000

Tr. at 1131.

162. In connection with the Linscomb and Manville negotiations, Plaintiffs' Counsel developed an understanding of the respective settlement shares of all asbestos defendants. Generally, Manville's share was 30% to 33%, while ACF members collectively bore responsibility for 80% to 85% of the remainder. Tr. at 1133. Plaintiffs' Counsel learned that Fibreboard, an ACF member, was responsible for approximately

12% of the ACF liabilities. Thus, by arithmetic, Plaintiffs' Counsel were able to isolate a settlement share range for Fibreboard as between 6% and 7% of the total (80% x 70% x 12%), and to apply that range to the average case settlement values by disease that they had developed. Tr. at 1133. That calculation produced the following Fibreboard settlement share ranges:

Disease	Total Liability			Fibreboard Share
Manville share	(30%)	(33%)	(6%)	(7%)
Mesothelioma	600,000	660,000		36,000 to 46,200
Lung Cancer	225,000	247,500		13,500 to17,325
Other Cancer	120,000	132,000		7,200 to 9,240
ALD I	112,500	123,750		6,750 to 8,662
ALD II	36,000	39,600		2,160 to 2,772

Tr. at 1134-36.

163. During global negotiations in 1993 with Fibreboard and the Insurers, Plaintiffs' Counsel based their negotiating positions on the average settlement values developed in Linscomb and developing in Manville, and also compared them with values reflected in the Initial Ness Motley Agreement and evolving in the negotiations of the Substitute Ness Motley Agreement. Tr. at 1129-33, 1157.

164. Based on the foregoing, the Court finds that it was reasonable from the standpoint of members of the Global Health Claimant Class for Plaintiffs' Counsel to use these settlement values in the global settlement negotiations during 1993.

165. On August 16 and 17, 1993, there was a meeting in Atlanta of the Ness Motley-affiliated law firms (as well as other attorneys) to discuss, among other things, the recently concluded Substitute Ness Motley Agreement and the status of the Fibreboard global negotiations. The meeting was attended by all of Plaintiffs' Counsel. Stephen Snyder (representing Fibreboard) and Meyer G. Koplow (representing Continental) attended to address the meeting on the Coverage Case. Informal discussions among the negotiators then present made it apparent that a solution to the Pacific issue needed to be found or a global agreement would not be reached. Tr. at 1452-53, 2448. Although the parties recognized that they should endeavor to reach a settlement by August 27, Continental's action against Fibreboard was not scheduled to commence until September 13, 1993. Tr. at 1420-21, 1458-60.

166. On August 18, 1993, Continental and Pacific representatives each met with Judge Higginbotham in Dallas. Continental was seeking to obtain an agreement from Pacific to share in the cost of a global settlement so that the issue of an acceptable level of contribution from Pacific could be removed as an obstacle to a deal. Pacific maintained its position that it would not participate in global settlement negotiations. Tr. at 1422-23.

167. Having failed to bring Pacific to the negotiating table, Mr. Koplow met with Messrs. Rice and Cox on August 20, 1993 in Charleston to discuss a structure for a global settlement without up-front participation by Pacific, which would potentially leave Pacific with exposure to massive ongoing liability. Such an alternative structure would have entailed Continental in the first instance contributing more than

its equitable share of a global settlement, with the hope of eventually recouping its overpayment. At the August 18 meeting with Judge Higginbotham, Continental had exposed its alternative structure to Judge Higginbotham to solicit his views and reactions. Although Messrs. Rice and Cox pressed for a Continental commitment to do such a deal, Mr. Koplow stated that he would require until the night of Sunday, August 22 -- when negotiations were set to resume in Philadelphia --either to bring Pacific to the table or to commit to proceed on a deal without Pacific. Tr. at 1421-22, 1424.

168. High-level discussions between Continental and Pacific thereupon took place over the weekend of August 21 and August 22, 1993 in New York. On Sunday, August 22, Continental and Pacific reached a memorandum agreement, subject to the approvals of their respective boards of directors (which subsequently were given), to resolve the dispute between them with respect to equitable contribution rights. (This agreement was subsequently superseded by an agreement between them dated October 12, 1993.) Tr. at 1422-25; Continental Exhs. 20, 21.

169. Pursuant to that agreement, Pacific agreed to share with Continental the costs of funding a global settlement of future asbestos-related personal injury claims against Fibreboard, on the basis of Continental paying approximately 65% of the total amounts that would be required, with Pacific being responsible for the remaining 35%. They also agreed to share the costs of satisfying liabilities on any existing asbestos-related personal injury claims, pursuant to a separate provision of that agreement. In the event no global settlement or other resolution of the insurance coverage dispute was

reached or the requisite court approvals were not obtained, Continental and Pacific agreed that the parties would continue to contribute on the same shared basis toward satisfying Fibreboard's liabilities to asbestos personal injury claimants to the extent that either or both of them were finally determined in the Coverage Case to be responsible for such liabilities. Continental Exhs. 20, 21.

170. As scheduled, global negotiations resumed in Philadelphia at the Four Seasons Hotel on the evening of Sunday, August 22, 1993. Fibreboard, Continental and Plaintiffs' Counsel, as well as Mr. Sweeney, were present. Everyone was informed of the Continental-Pacific agreement and the negotiations proceeded. Tr. at 329-30, 409-10. Continental indicated that the Insurers' preference was to negotiate a global settlement of both present and future claims, and asked Plaintiffs' Counsel to price an all-inclusive global settlement. Although Plaintiffs' Counsel expressed a willingness to do so ten days earlier in Dallas, they now stated that they were unwilling to do any global deal that included present cases. The reason given was an inability to satisfy themselves as to the remaining Fibreboard exposure on unsettled present cases. The quality and quantity of information that existed as of August 22, 1993, were not adequate for Plaintiffs' Counsel to be willing to price a global settlement including these claims.[19] Thus, the

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[19]Plaintiffs' Counsel's position in this regard is understandable. It is apparent from the testimony that neither Fibreboard nor Continental was in a position to fix with any degree of precision the number or source of unsettled present claims against Fibreboard. Tr. at 713-15, 719-20, 2677-79; Fibreboard Exh. 827. Any significant underestimation of present cases would have a much larger effect on a settlement fund than underestimates of claims that would

(continued...)

parties proceeded to focus solely on a future claims-only global settlement. An offer of $1.3 billion from Continental was rejected by Plaintiffs' Counsel. Tr. at 329-31, 1426-27, 1442-45, 1573-74.

171. Throughout the negotiations following the April 9 Agreement, Plaintiffs' Counsel had raised the issue of the value of Fibreboard's equity in any settlement where there would be no further recourse to Fibreboard or the Insurers. On the night of Monday, August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. Continental viewed the $200 million amount of the increase as approximately equivalent to the maximum value of Fibreboard, and offered it to compensated for the fact that Fibreboard's non-insurance assets were not available due to the April 9 Agreement. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Tr. at 1445-50. Indeed, the Insurers' counsel had no authorization from their clients to agree to a higher amount, and the Continental-Pacific agreement reached the previous Sunday had as its express premise that the amount needed to reach a global settlement was $1.5 billion. Tr. at 1444-47, 1462, 1471; Continental Exh. 20.

172. Even though Plaintiffs' Counsel had previously determined that they would settle if they could get $1.5 billion, Tr. at 1014-16, the Continental-Pacific offer was likewise rejected, with some of Plaintiffs' Counsel walking out

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[19](...continued)
appear over a period of years.

of the meeting. Negotiations broke off. It was, however, agreed that one, final, last-ditch effort would be made to reach agreement before the submission of the Coverage Case appeal on Friday, August 27, 1993. The parties agreed to convene in Tyler, Texas in the early afternoon of Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. Tr. at 331-32, 1444-51. The Insurers viewed this as yet another effort by Plaintiffs' Counsel to extract every last cent from the Insurers' pockets. Tr. at 1464-65.

173. The global settlement discussions reconvened in the Court's chambers on the afternoon of August 26, 1993. All parties were represented. This was the first direct involvement of this Court in these discussions. The parties outlined their positions and the Court spent several hours listening to parties state their unwillingness to change their positions. In particular, Plaintiffs' Counsel sought to obtain from Fibreboard a contribution to the settlement of cash beyond the money to be paid by Fibreboard's insurers. No progress was made during several hours of those discussions. Tr. at 332-33, 1457-65.

174. Late in the afternoon on August 26, as the Courthouse was closing, the principal negotiators for each party were driven to the Court's home for further discussions. After several more hours of discussion, Continental's counsel agreed to recommend to Continental an increase of $25 million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. Tr. at 333-35, 1465-73. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached. Tr. at 1473-74.

175. The evidence is uncontroverted that throughout the negotiations conducted on August 26 and August 27, 1993, the Court's role was the normal role of a court assisting the parties in reaching an agreement, if they could do so. Tr. at 752-54, 1014-18, 1279-85, 1465, 1469, 2450-51.

176. Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $10 million contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute. Tr. at 1285, 1474-77.

177. Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the Coverage Case that would become operative if for any reason a global settlement failed to achieve final court approval. Tr. at 1052-53, 1181-83, 1632. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the Coverage Case while a global settlement was pending approval in the courts. Tr. at 707-08, 913-14, 115354. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement.

This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. Tr. at 332-36, 1474-78. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement, and, late in the afternoon of August 27, 1993, Fibreboard reluctantly acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. Tr. at 334-36, 592-94, 1379-80. The backup settlement is what is now referred to as the "Trilateral Settlement."

178. During the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the Coverage Case appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27 after this Court advised the parties that it would soon close for business was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement"). Tr. at 1480-81.

179. The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than

January 1, 1994.[20] In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve either through litigation or settlement -the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 17, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount -not as of then determined -would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust. Fibreboard Exh. 592.

180. In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all information including information that would otherwise be protected by privilege or trade secret confidentiality -- as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the

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[20]The Global Settlement would be subject to final court approval. Upon such approval, the original amount in the escrow account, plus any accrued interest thereon, would be transferred into a settlement trust (the "Trust"). Should the Global Settlement fail to receive final court approval, the principal and interest in the escrow account would revert to the Insurers. Fibreboard Exh. 592.

were described to this Court on September 9.[21] Tr. at 1487. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. Tr. at 1487; Complaint, Dkt. No. 1 (Sept. 9, 1993); Motion for Preliminary Injunction and Temporary Restraining Order, Dkt. No. 7 (Sept. 9, 1993); Joint Motion for Provisional Class Certification, Dkt. No. 12 (Sept. 9, 1993). This Court thereafter granted the motions for provisional class certification and for a temporary restraining order. Order Granting Motion for Class Certification, Dkt. No. 16 (Sept. 9, 1993); Temporary Restraining Order, Dkt. No. 11 (Sept. 9, 1993).[22]

186. Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. During this period of time, Plaintiffs' Counsel did not engage in any negotiations of the terms of the Global Settlement. Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the

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[21]The amendments to the April 9 Agreement were ultimately memorialized in a document entitled "Supplemental Agreement," which was executed on October 12, 1993. Tr. at 1488.

[22]On September 16, 1993, this Court granted the Insurers' motion seeking an extension of the temporary restraining order. Order Granting Motion to Extend Time of TRO, Dkt. No. 19 (Sept. 16, 1993). On September 27, 1993, this Court held a hearing on the Insurers' motion for a preliminary injunction enjoining the Global Health Claimant Class from commencing litigation against Fibreboard or the Insurers. Continental Exh. 17. On September 28, 1993, this Court granted the motion for a preliminary injunction. Preliminary Injunction, Dkt. No. 29 (Sept. 28, 1993).

"Trilateral Settlement Agreement") on October 12, 1993. Tr. at 336-38, 1482-88; Fibreboard Exh. 910. On that same day, an amended Continental-Pacific agreement was also signed setting forth the details of the Insurers' sharing arrangements, Continental Exh. 21, as was the Supplemental Agreement. Tr. at 1488.

187. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global settlement in principle had been put on the record on August 27, 1993, hundreds of detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In additions, the "Third-Party Claimant Class Settlement" was negotiated during this time period. Tr. at 402-03, 1489, 1496-97.

188. The negotiations on the written global agreement were, for the most part, a slow and very contentious process, during which disagreements with regard to a number of significant issues arose. Tr. at 411, 1489. In particular, there were disputes among the parties regarding, inter alia: (i) the scope of the claims against the Insurers that would be extinguished by the global agreement, as to which the Insurers' position was that the Fibreboard insurance policies would be disposed of and the Insurers would thereby receive "total peace"; (ii) the meaning of the term "total peace" itself, which term had been used by counsel for the Insurers when the parties originally announced the global agreement in principle in open court on August 27, 1993; (iii) which party or parties were to

bear the risk of liability for claims that for some reason could not be extinguished; (iv) the indemnity obligations of Fibreboard and of the Trust to be created as part of the Global Settlement; (v) the process for amending the global agreement in the future; (vi) how to resolve issues related to claims asserted by Plant Insulation Company; and (vii) the operation of the Trust, including investment restrictions and spendthrift provisions. Tr. at 1489-96.

189. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement and now referred to as the "ThirdParty Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993. Tr. at 1496-97; Fibreboard Exh. 912.

VI. KEY SETTLEMENT TERMS[23]

190. The Global Settlement Agreement and the Trilateral Settlement Agreement each operate to settle the Coverage Case and to extinguish all liability of the Insurers under or in connection with the policies. The two agreements operate, however, to create very different procedures for

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[23]Because it is necessary to do so in order to explain the settlements under consideration, the Court has summarized various portions of the detailed agreements before it. There is no dispute before the Court about the meaning or intended operation of the language of these agreements, and these provisions are not before the Court for judicial construction. The Court does not intend any portion of these findings, including the summaries of the agreements which appear throughout, to be preclusive if disputes about the meaning or operation of these agreements should arise.

handling the proceeds from the settlement of the Coverage Case, with very different likely economic effects on the class members. Fibreboard Exhs. 910, 912.

A. The Global Settlement

191. The Global Settlement Agreement -which is subject to court approval - provides a structure for the handling of the proceeds of the Coverage Case settlement and the additional funds to be contributed by Fibreboard. The intentions of the parties to the Global Settlement Agreement (the "Settling Parties") in creating the procedure for handling the Coverage Case settlement proceeds are patent on the face of the Global Settlement Agreement. They are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid first; and (v) to protect the Trust's assets from unduly risky investments. Tr. at 1493-96, 1521-24; Fibreboard Exh. 912 (Global Settlement Agreement).

192. The Global Settlement Agreement settles all claims for asbestos-related personal injury or death against

contain each and every one of certain specified provisions. These additional requirements are that the judgment must:

> declare with respect to the claims of both the Global Health Claimant Class and Global Third-Party Claimant Class that the settlement is fair, reasonable and adequate and was entered into in good faith; that the members of both classes have received adequate notice of the settlement; and that Global Health Claimant Class members have been adequately, professionally and ethically represented by class counsel; --approve the releases and indemnities contained in the Global Settlement Agreement, and the provisions in the Global Settlement Agreement and TDP for the resolution of the Global Third-Party Claims; --permanently enjoin Fibreboard from asserting against Continental or Pacific any claim released or discharged under the Global Settlement Agreement, and permanently enjoin any Global Health Claimant Class member or Global Third-Party Claimant Class member from asserting against Fibreboard, Continental, or Pacific any claim released or discharged under the Global Settlement Agreement; --discharge Fibreboard, Continental and Pacific from any further liability with respect to any Global Health Claimant Class Member Claim[25] or Global

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[25]The formal definition of the "Global Health Claimant Class Member Claim" is set forth in the Glossary to the Global Settlement Agreement, (continued...)

Third-Party Claim; declare to be fair, reasonable and non-collusive the provision in the Global Settlement Agreement under which Fibreboard and the Insurers agree that the Insurers shall be discharged from any further obligation under or in connection with the policies, except as specifically assumed or preserved under the various settlement agreements between them; -- declare that only payments of funds pursuant to a Global Health Claimant Class member's individual settlement with the Trust, and not entry into or final approval of the Global Settlement Agreement, shall trigger the notice, approval and forfeiture provisions on the Longshore and Harbor Workers Compensation Act and any similar provisions of state and federal workers' compensation laws;--order all Global Health Claimant Class Member Claims, except for punitive or exemplary damages, which are not allowed and will be barred, directed to the Trust for disposition pursuant to the Trust Agreement and TDP;--order the parties to implement the Global Settlement Agreement; --order dismissal of this action, including all of the Global Health Claimant Class Member Claims (including all punitive and exemplary damage claims) against Fibreboard, Continental and Pacific, on the merits, with prejudice to reassertion and without costs; --

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[25](...continued)
Fibreboard Exh. 912 (Exh. A), under the term "Class Member Claim."

> determine and award the fees and expenses of counsel appointed to represent the classes; and --retain exclusive jurisdiction to: (a) enforce the Global Approval Judgment; (b) resolve any disputes with respect to the performance or interpretation of the Global Approval Judgment or Global Settlement Agreement; (c) adjudicate any attempt to challenge the Global Approval Judgment; and (d) oversee the maintenance, administration and distribution of the Trust and the funds contained therein, subject to and in accordance with the provisions of the Trust Agreement and TDP. Fibreboard Exh. 912 (Exh. A (Glossary)) at § 47.

196. For the Global Settlement Agreement to be finally effective there must also be a final, nonappealable order, judgment or decree of a court either approving or disapproving the separate Trilateral Settlement Agreement. Fibreboard Exh. 912 (Exh. A (Glossary)) at § 47.

197. The Global Settlement Agreement contains a number of provisions to deal with the possibility of a person or entity seeking to attack the Global Settlement Agreement subsequent to its final approval. Thus, the agreement provides that the Trust will indemnify Fibreboard, Continental and Pacific against any costs, fees, claims, liabilities, settlements or judgments incurred or occurring after the entry of Global Approval Judgment and resulting in any way from the assertion against any of them of any Global Health Claimant Class Member Claim or any Global Third-Party Claim, including any claim attacking the validity or enforceability of Global

Approval Judgment. Moreover, the agreement provides that, upon entry of Global Approval Judgment, Fibreboard will indemnify Continental and Pacific against any and all costs, fees, claims or liabilities relating in any way to claims arising from the exposure of a Global Health Claimant Class member to asbestos-containing products for which Fibreboard may be legally liable, including those attacking the validity or enforceability of Global Approval Judgment, except for (i) defense fees and costs directly attributable to such an attack, and (ii) costs, claims or liabilities that the Insurers have specifically undertaken to pay under the various settlement agreements. As to claims against Fibreboard that would not be covered by this indemnity, such as claims unrelated to asbestos, and that could be claimed to give rise to a direct action against the Insurers, Fibreboard agreed to reasonably and diligently defend and promptly pay such claims so as to preclude any such direct action claims. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 2.7, 2.8.

198. The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third-Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third-Party Claims are obtained. The Global Settlement Agreement contains provisions that deal with the possibility of the Court otherwise being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-

settlement amount, which fees would not be paid out of the Trust's funds. Fibreboard Exh. 592.

181. As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and provided funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved. Fibreboard Exh. 592.

4. August 27, 1993 to December 23, 1993

182. On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Although there had been an apparent agreement on the price term for the Trilateral Settlement on August 27, the parties did not have the same understanding of the agreement, and a week of difficult and contentious negotiations brought no resolution of their differences. Tr. at 336-38, 1482-85.

183. On September 8 and the morning of September 9, 1993, Fibreboard and the Insurers engaged in pressured and contentious negotiations in a further attempt to reach agreement on the terms of the Trilateral Settlement. Due at least in part to the pressure of the scheduled appearance before this Court, on the afternoon of September 9 Fibreboard and the Insurers agreed to submit to their clients for consideration a pricing formula that neither side would attempt to modify, i.e., the decision to be made with respect to the deal was to be either affirmative or negative. The formula provided for a total price of $2 billion. Tr. at 1485-86.

184. Fibreboard had believed that by entering into the Trilateral Settlement it would be settling with the Insurers solely with respect to its asbestos-related liabilities. Continental, however, believed that the Trilateral Settlement resulted in a complete resolution of all liabilities under the policies: in effect, a complete policy buyout. After extensive, hard-fought negotiations on this point, Fibreboard acceded to Continental's position. Tr. at 336-37. In addition, Continental insisted that Fibreboard agree that the signing of a global settlement agreement - whether or not such agreement was finally approved by the courts - discharged all of Continental's obligations under the April 9 Agreement to use its best efforts to obtain a global settlement. Fibreboard also acceded to this demand. Tr. at 337-38.

185. The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement,

Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class. Such claims include, without limitation, any and all asbestos-related claims for (i) personal injury, damage or death, and all forms of mental or emotional harm; (ii) loss of support, services, consortium, companionship, society, and other valuable services made by spouses, parents, children or other relatives, whatever such claims are called, including, without limitation, wrongful death or survival actions; (iii) punitive, aggravated or exemplary damages of any sort; and (iv) all claims arising directly or indirectly from any of the claims described in (i) through (iii) above, including direct action claims against the Insurers or any asbestos-related personal injury claims in which it is claimed that coverage is provided by any of the insurance policies issued by Continental or Pacific to Fibreboard. Fibreboard Exh. 192 (Global Settlement Agreement) at § 2.1.

193. Upon establishment of the Trust, all asbestosrelated personal injury and death claims of members of the Global Health Claimant Class against Fibreboard, Continental or Pacific under or in connection with the insurance policies will thereafter be directed to the Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). Fibreboard Exh. 912 (Exh. B, Annex A (TDP)).

194. Pursuant to the Global Settlement Agreement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos-related personal injury or death claim. In addition, the Global Settlement Agreement contains an agreement between Fibreboard and the Insurers that the

Insurers are discharged from any and all obligations (whether direct or indirect) under or in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except of obligation specifically assumed or preserved in the various agreements between them. The claims that are subject to that agreement between Fibreboard and the Insurers include asbestos claims other than personal injury and death claims as well as nonasbestos-related claims, notwithstanding that persons or entities who may seek to assert such claims against the Insurers may not be members of either the Global Health Claimant Class or the Global Third-Party Claimant Class. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 2.2, 2.5, 2.6; Tr. at 395.

195. As noted above, transfer of the funds from the escrow account to the Trust will not occur until there has been final court approval of the Global Settlement Agreement, and entry of "Global Approval Judgment" as defined therein. Global Approval Judgment means one or more final, nonappealable judgments, order or decrees in a proceeding or proceedings in which Fibreboard, the Insurers, the Global Health Claimant Class members and all persons having or who may have Global Third-Party Claims[24] have been made parties, either directly or in a representative capacity, which, among other things, approves the terms and provisions of the Global Settlement Agreement and the Trust Agreement and TDP. In addition to such approvals, Global Approval Judgement must

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[24]The formal definition of "Global Third-Party Claim" is set forth in the Glossary to the Global Settlement Agreement, Fibreboard Exh. 912 (Exh. A), under the term "Third Party Claim."

party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 6.2, 6.3.

198A. The Provisions of the Global Settlement Agreement require a discharge of and injunction against Global Third-Party Claims. Two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, filed objections based on the Eleventh Amendment to the United States Constitution, arguing that they are immune from the jurisdiction of the United States district courts absent their consent, and therefore could not be bound by the settlement. During the course of the fairness hearing, the Court expressed the view that such an objection appeared to be well taken. Tr. at 338-339. The Settling Parties entered into a "Third Amendment to Global Settlement Agreement" ("Third Agreement") as of May 15, 1995. The Third Amendment, among other things, amends section 6.3(B) of the Global Settlement Agreement to provide that, in the event that the necessary discharges and injunctions against any Global Third-Party Claims cannot be obtained because it is shown or agreed among the Settling Parties that the Court lacks jurisdiction to enter such discharge or injunction, then Global Health Claimant Class members will reduce judgments in their favor against the holder of such Global Third-Party Claims in such amounts as may be necessary to extinguish any such Global Third-Party Claims under applicable law. The Settling Parties have agreed that the fifty states of the United States (and their governmental

units and divisions entitled to immunity under the Eleventh Amendment), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction.

198B. Pursuant to Court Order, the Settling Parties disseminated notice of the Third Amendment to all persons who were sent individual notice previously. No intervenor filed objections, nor did the Court receive any other written objections of substance. The subject of the Third Amendment came on for hearing, after notice, on June 20, 1995. No one appeared to object to the Third Amendment as it relates to the Eleventh Amendment and sovereign immunity points. The Court finds that the Third Amendment provisions calling for reduction in judgment respecting those Third-Party Claims of state and foreign governments (and their units and divisions) described in the preceding paragraph are fair and reasonable and necessary to avoid risk of failure of the Global Settlement Agreement through inability to obtain the necessary discharges of and injunctions against those Global Third Party Claims.

199. Fibreboard and the Insurers considered it important for several reasons that the Trust be structured so that it would be in the best position possible to provide compensation to asbestos claimants in the future, and to do so in a fair and equitable manner. First, they were aware of the experience of other trusts established in the mass tort contest, and especially the asbestos context, in which the interests of later claimants against the trust were not protected as well as the interests of earlier claimants. Second, they wanted to take into account the possible effect that creating a fund in excess of $1.5 billion would have in generating additional claims. Third, they

sought to minimize the likelihood that the Trust would be exhausted before compensating all claimants, causing future claimants to assert claims directly against Fibreboard and the Insurers. Finally, the parties wanted the Global Settlement - including the structure of the Trust and related TDP and spendthrift provisions - to be recognized as fair by class members and the plaintiffs' bar, as well as to be adjudicated as fair by the Court. Tr. at 1494-96, 1498-1500.[26]

200. The TDP negotiated by the Settling Parties provides the structure for the handling of claims against the Trust and equitably distributing Trust assets to claimants. The TDP mandates that claimants first seek to settle with the Trust. If that does not result in the disposition of the claim, the claimant must first proceed to mediation and then arbitration. If the claimant has not achieved an acceptable resolution of the claim, he or she may then try the claim in the tort system, subject to the overall limit of $500,000 per claim. Punitive damages and prejudgment interest are not available to any claimant against the Trust. Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten. Fibreboard Exh. 912 (TDP) at §§ C, D, F; Tr. at 1521-27.

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[26]The Settling Parties have not, however, represented that there is any guarantee that the funds in the Trust will in fact be sufficient to compensate all future claimants. To the contrary, they -and the Insurers in particular -have emphasized the uncertainty that exists in this regard. Tr. at 1500-02, 2241-60.

201. In order to make certain that some assets will always be available to claimants who assert claims against the Trust years into the future, the TDP contains spendthrift provisions that limit the proportion of Trust assets that can be paid in any one year. These limits leave some flexibility to the Trustees, but they operate to prohibit the exhaustion of Trust assets far into the future. Fibreboard Exh. 912 (TDP) at §§ E, F; Tr. at 1531-32. The Court finds that the Settling Parties adopted these limits as a reasonable attempt to ensure that funds would be available to pay future claimants.

202. Inasmuch as the Trust is limited in the amounts that can be paid to claimants in any given year, it was necessary to adopt a mechanism to distribute the Trust funds available in any given year in the event that those funds are insufficient to pay all claimants. The Settling Parties agreed upon a system in which claimants suffering from more serious disease are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first. Fibreboard Exh. 912 (TDP) at § F; Tr. at 1521-22.

203. Based on all of the evidence -- and particularly the testimony of Messrs. Snyder, Wartnick, Kazan, Cox and Koplow, which this Court finds to be credible -this Court finds that the Global Settlement was the result of extremely hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would

actually be reached. The Court further finds that the record contains no evidence of collusion, and that the Global Settlement amount of $1.535 billion is well within the range of those values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it. Findings of Fact ¶¶418-446. The Court finds that it is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement. This Court finds, based on the overwhelming credible evidence, that the Global Settlement is fair, reasonable and adequate.

204. On December 30, 1993, pursuant to Paragraph 3 of the Escrow Agreement, Fibreboard Exh. 912 (Exh. D), the Insurers transferred $1.525 billion to an escrow agent. On June 14, 1994, the Insurers executed an interpleader bond, agreeing therein to bind themselves to further appropriate orders of this Court concerning distribution of the fund. On June 16, 1994, this Court approved the form of the interpleader bond. The Insurers have complied with the terms of the interpleader bond and the Escrow Agreement. Tr. at 1542-43; Continental Exh. 26; Order, Dkt. No. 226 (June 16, 1994).

B. The Third-Party Claimant Class Settlement

205. A settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representatives of the Global Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement

Agreement. The Third-Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific. Fibreboard Exh. 912 (Exh. C).

206. The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgement shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP. Fibreboard Exh. 912 (Exh. C) at § II.

207. Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgement against a Global ThirdParty Claimant Class member, the class member receives a reduction of any judgment subsequently entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. For example, where state law provides for a pro tanto (i.e., dollar-for-dollar) set-off, any judgment against a Global Third-Party Claimant Class member will be reduced by the amount the personal injury

claimant received from the Trust. Fibreboard Exh. 912 (TDP) at § H1; Tr. at 2283-84.[27]

208. Second, where a personal injury claimant exhausts the Trust process and litigated against the Trust in the tort system, and also files suit against a Global ThirdParty Claimant Class member, the class member likewise receives a judgment reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Fibreboard Exh. 912 (TDP) at § H3; Tr. at 2285-86.

209. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust. (There is one exception: if the class member were not satisfied with the Trust's offer, it - unlike a personal injury claimant against the Trust - would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.) Fibreboard Exh. 912 (TDP) at §§ H2, H5; Tr. at 2285.

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[27]Profession Edward Sherman is a distinguished law professor at the University of Texas. His particular fields of expertise are complex litigation, on which he has written books, and class actions, on which he has written numerous articles, including articles discussing asbestos litigation. Tr. at 2281; Owens-Illinois Exh. 1. At the fairness hearing, Professor Sherman presented cogent and credible testimony concerning the merits of the Third-Party Claimant Class Settlement Agreement.

210. The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers. Fibreboard Exh. 912 (TDP) at § H1, Tr. at 1511-13, 1561-64, 2285-87.

211. The Court finds that the Third-Party Claimant Class Settlement redounds to the substantial benefit of Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Tr. at 2295-96. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

212. In addition, the Court finds that the ThirdParty Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Tr. at 2288. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred

in the Manville proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative. Tr. at 2293-95.

213. The Court finds that the Third-Party Claimant Class Settlement also minimizes defense and other transaction costs incurred in the resolution of Global Health Claimant Class members' claims against Fibreboard, thereby increasing the amount of money the Global Health Claimant Class will receive reflecting Fibreboard's share and, derivatively, the size of the set-offs Global Third-Party Claimant Class members will receive. Tr. at 2296.

214. The Court finds that the Third-Party Claimant Class Settlement further allows for the husbanding (through the TDP) of the assets available to pay Fibreboard's liability share, thereby giving Global Third-Party Claimant Class members greater assurance that a source of set-offs will exist for an extended period of time. Tr. at 2289-91, 2295.

215. Finally, the Court finds that the Third-Party Claimant Class Settlement confers upon Global Third-Party Claimant Class members the substantial further benefits of (i) releasing them from any contribution or indemnification claim by Fibreboard or the Insurers; (ii) increasing the likelihood that Fibreboard will be able to meet its unfunded obligations on its settlements of present cases, Tr. at 404-06; and (iii) entitling them to obtain information about personal injury claims received by the Trust in the claims process, thereby reducing the need for them to conduct discovery. Tr. at 229192.

216. The Court finds that the Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. The credible evidence demonstrates that these negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as Georgine and Manville. Tr. at 401-05, 1195.

217. The overwhelming credible testimony demonstrates, and this Court finds, that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

218. The Trilateral Settlement Agreement, which by its terms is subject to the court approval, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. Tr. at 1507-09; Fibreboard Exh. 910 at § 4.1. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (expect for obligations that an Insurer has specifically assumed or preserved

under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). Tr. at 337; Fibreboard Exh. 910 at §§ 1.1, 4.1 The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. Tr. at 377-78. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack. Fibreboard Exh. 910 at § 3.3.

219. The Trilateral Settlement Agreement provides for alternative handling of the consideration paid by the Insurers depending on whether or not the Global Settlement is finally approved. Tr. at 375-79; Fibreboard Exh. 910 at §§ 2.2, 2.3. If the Global Settlement is approved, and the Global Approval Judgment described in the Global Settlement Agreement is entered, the $1.525 billion that the Insurers have paid into an escrow fund (to be supplemented by $10 million from Fibreboard), together with interest and earnings thereon, less certain expenses and amounts paid for interim claims, will be directed to the Trust established pursuant to the Global Settlement Agreement to settle claims of the future asbestos claimants and to pay Trust expenses. If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries -not only claims not filed or settled prior to August 27, 1993, but also asbestos-related

personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims. Fibreboard Exh. 910 at §§ 2.2, 2.3; Tr. at 374-77.

220. The credible evidence establishes, and the Court finds, that the Trilateral Settlement was the result of extremely hard fought, arms's-length negotiations between Fibreboard and Continental. The negotiations leading to the Trilateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court further finds that the Trilateral Settlement is fair and reasonable.

D. The Longshore Settlement

221. On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, et seq., and related statutes. A full discussion of this settlement, and Findings of Fact related thereto, are set forth below at Findings of Fact ¶¶ 398-417.

VII. FUTURE CLAIMS AND VALUE PROJECTIONS AND THEIR IMPLICATIONS FOR THE THREE LITIGATION/SETTLEMENT SCENARIOS BEFORE THE COURT

222. The Court has heard detailed testimony and received reports from three distinguished outside experts -- Dr. William Nicholson (identified above at Findings of Fact ¶ 97), Dr. Thomas Vasquez of KPMG Peat Marwick, and Dr. Mark Peterson of Legal Analysis Systems - concerning the number, mix and timing of the asbestos personal injury claims that Global Health Claimant Class members can be expected to bring against Fibreboard (or the Trust) over the next several decades. In addition, the Court has received extensive evidence from Dr. Peterson going to the appropriate valuation of such claims, as well as to the anticipated costs of defense and administration relating to such claims, both on the assumption that Fibreboard remains in the tort system and on the assumption that the Trust becomes operations. The Court finds that Drs. Nicholson, Vasquez and Peterson each used well established and scientifically reliable methods to estimate future claims activity. The Court has also had the benefit of testimony by experienced and knowledgeable counsel, representing both the Global Health Claimant Class and Fibreboard, as to what the future holds for Fibreboard in terms of claims of the Global Health Claimant Class members and the cost of those claims. Tr. at 836-97, 1786-2279, 25652641; Continental Exhs. 33-37, 37A-37D, 48-51, 51A, 51B, 52, 54; Fibreboard Exhs. 823, 826; Class Plaintiffs Exhs. 1010, 1016.

223. The Court finds that there are a great many uncertainties associated with any effort to project the

number of future asbestos personal injury claims and their costs. Indeed, in the Court's view, the only certainty in this area is that any prediction of an exact overall number of claims, or their exact mix, or their exact dollar value, or the exact amount of costs associated with their handling (in or out of the tort system), will in the end prove incorrect. Tr. at 1993-2000, 2262-63, 2266. Continental Exhs. 34 at 2 & Exh. A.

224. Despite the inherent uncertainties involved, and the impossibility of predicting the future with precision, the Court finds the work of the experts and the views of counsel to be of material assistance in arriving at a reasoned assessment of the risks associated with each of the three basic "scenarios" that are presented by the record: the "Coverage Case scenarios"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

225. The Coverage Case scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval -the parties instead being remitted to continued litigation of Global Health Claimant Class member claims in the tort system, and to prosecution of the Coverage Case to a conclusion in the California courts. The Coverage Case scenarios entails a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. Findings of Fact ¶¶ 34-58. In such an event, it is obvious - in light of (i) the relative insubstantiality of Fibreboard's non-insurance resources, Findings of Fact ¶¶ 59, 96; and (ii) its large exposure to presently existing claims (both settled and unsettled) -that in the event it lost the Coverage Case Fibreboard would at best be able to meet only a small portion

of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated. Tr. at 168-69, 1056-57, 2321-23.

226. There is, of course, also the FibreboardContinental dispute concerning the consequences (if any) of Fibreboard's unilateral assignments to asbestos claimants of rights under the Continental policy. Should Continental finally prevail in its position (vigorously disputed by Fibreboard) that Fibreboard's assignment program entirely vitiated the Continental insurance, Fibreboard would be left with only several hundred million dollars to cover both preand post1959 claims. Any such outcome would render a Fibreboard Coverage Case victory hollow indeed, and would guarantee, again, a massive shortfall in funds to compensate the Global Health Claimant Class -and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted. Tr. at 148-49, 169-70, 1545; Fibreboard Exh. 905.

227. The Trilateral Settlement scenario, while eliminating the Coverage Case risk, nevertheless is problematical for the Global Health Claimant Class. While the Court credits as genuine the optimism expressed in Fibreboard's public statements and in the testimony of Mr. Snyder, its counsel, the Court also notes that Fibreboard's counsel acknowledges a "substantial risk" that the funds provided under the Trilateral Settlement could in the end prove insufficient to assure Fibreboard's survival and provide compensation to all asbestos

claimants against it. Tr. at 437. Given the many uncertainties involved, the Court cannot adopt with confidence either the view of Fibreboard counsel or the pessimistic view of those, including Mr. Kazan and Dr. Peterson, who think it clear that Fibreboard would fall substantially short of meeting all claims under a Trilateral Settlement regime. On the complete record, the Court finds that there is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Global Health Claimant Class without compensation in the event individual actions and adjudications with respect to class member claims were to be permitted. Tr. at 696-98, 914-16, 1201-05, 2053-54, 2059-60, 2667-74; Fibreboard Exh. 919; Continental Exhs. 34 at 65 (Table 39), 37A-37D.

228. Although, again, there are substantial uncertainties involved, and although there is a significant risk -- more than a mere possibility -that there will be a shortfall, the Court finds it more probable than not that under the Global Settlement scenario all Class claims will be paid at fair and appropriate values, although it is not unlikely that some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust. Tr. at 2001-02, 2042-47; Continental Exhs. 35 (Table 38a), 37B37D, 49; Class Plaintiffs Exhs. 1010, 1012, 1019, 1020.

229. In particular, the Court finds no credible evidence that the 1992-93 spike in claims against Fibreboard represents a material permanent increase in the propensity of asbestos victims to sue Fibreboard. Rather, the Court accepts the consensus view of the experts that the phenomenon is a temporary one caused by certain non-recurring events -- such as

the Georgine class action, an increase in case consolidations, the Fibreboard group settlement program and the public awareness (at least among the asbestos plaintiffs' bar) of the very negotiations leading to the Global Settlement itself. Tr. at 2010-11; Fibreboard Exh. 826; Continental Exhs. 37, 37A-37D. Further, the 1992-93 increased filings appear in significant measure either (i) to represent an acceleration of claims that would have been filed later anyway, rather than a real increase in the number of filings; or (ii) to the extent they did represent real new sources of filings, to be of materially lesser severity than Fibreboard's usual historical mix of claims. Tr. at 417-20, 2010-18, 202526, 2036-38; Fibreboard Exhs. 800-819. Finally, the Court notes that even the expert who expects the largest number of claims Dr. Peterson believes that, "under any plausible scenario of a great number that [he has] examined, " the Trust will have enough money to pay all claims. Tr. at 2002; Continental Exh. 49.

230. The Court further finds, upon the expert testimony and the entire record: (i) that the risks to the Global Health Claimant Class from the Coverage Case were such as to make it imperative for the Global Health Claimant Class to seek a reasonable global settlement with Fibreboard and the Insurers; (ii) that, indeed, the Coverage Case risk would have justified the Global Health Claimant Class in accepting such a settlement at a significant discount from whatever dollar amount might have been perceived to be necessary to provide compensation of all class members at appropriate and fair values; (iii) that in fact Plaintiffs' Counsel nevertheless held to their goal of accepting no discount from full value; and (iv) that the Global Settlement ultimately achieved is likely to provide fair and appropriate

compensation for all members of the Global Health Claimant Class.

VIII. COMPARISON OF GLOBAL AND TRILATERAL SETTLEMENTS

231. The Ortiz Intervenors have asserted that the Trilateral Settlement is, from the standpoint of Global Health Claimant Class Members, preferable to the global settlement, and thus the Global Settlement should not be approved by this Court.[28] Ortiz Intervenors Amended Objections, Dkt. No. 428 (Nov. 28, 1994). However, this Court finds, based on the credible evidence presented at the fairness hearing, that if it were up to the Court to choose between the two the Global Settlement is far preferable to the Trilateral Settlement from the standpoint of class members. The Court makes this finding based on a number of factors.

232. The Court finds that the funds available to resolve Global Health Claimant Class member claims under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present

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[28]Various objectors -- in particular the Ortiz Intervenors and the Flanagan Intervenors -- have advanced a wide array of objections to the Global Settlement. Generally speaking, these objections go to legal matters, rather than to any material factual disputes. All such legal objections are treated separately in this Court's conclusions of law. The Court finds, however, that as to any objections based on issues of fact, the Court has considered those objections and finds them to be without any basis in the record. Accordingly, the Court rejects those objections. There is no credible evidence that the Global Settlement is unfair, unreasonable or inadequate in any respect.

claims and other items under the Trilateral Settlement. Tr. at 378-85, 2667-68; Fibreboard Exh. 919 (Tab 1). However, the Global Settlement will provide substantially more money that actually reaches class members for compensation of their claims than will be provided to them under the Trilateral Settlement. This Court finds that the amount that would actually reach class members under the Trilateral Settlement would be at least hundreds of millions of dollars less than under the Global Settlement. Tr. 200203, 2054-56; Continental Exhs. 34 at 66-67 & Table 40, 37, 37A. And although there is a significant risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a greater likelihood that the funds will be insufficient to compensate all class members. Tr. 2058-60; Continental Exhs. 37B-37D. The Court finds that, under the Global Settlement, the operation of the Trust pursuant to the Trust Agreement and TDP will result in a far more costeffective system that promotes the settlement of claims rather than the defense of them. Tr. at 2056-57; Continental Exh. 48F.

233. According to Mr. Snyder, in order to survive under the Trilateral Settlement, Fibreboard would have to reduce settlement values down to one half of current levels -- an endeavor that would of necessity entail massive costs of defense. Tr. at 433-37, 2661-62, 2672-73. Accordingly, this Court finds that defense costs would be drastically less under the Global Settlement than under the Trilateral Settlement. Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Tr. at 379. In very stark contrast, the Court finds that under the Trilateral Settlement there is a substantial likelihood that Fibreboard would -- in a reasonable

effort to protect is corporate existence -- engage in an intensive litigation defense effort. In the past, Fibreboard has been able to lower asbestos-related claims settlement values on a regional basis, but doing so necessarily entailed a very large increase in defense costs. Likewise, before its entry into the ACF Fibreboard was historically a regional defendant, with its exposure to asbestos-related liability concentrated in the West Coast and Gulf Coast areas. As the Court has found, that exposure expanded nationally under the ACF. Findings of Fact ¶¶ 31-33. Under the Trilateral Settlement scenario, Fibreboard might reasonably determine to incur very substantial defense costs in an effort to return to its more limited pre-ACF geographic exposure, as other defendants -e.g., Owens-Illinois -have done. Tr. at 379-85, 2644, 2668-69, 2674-76.

234. Although Fibreboard's litigation strategy under the Trilateral Settlement cannot be determined with certainty, the credible evidence including testimony from Fibreboard's litigation counsel, Mr. Snyder demonstrates that there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants. Tr. at 379-81, 433-35.

235. The costs of defending asbestos personal injury tort claims against Fibreboard have been both substantial and highly variable, depending on the defense and settlement strategies employed by the company over time. From the time

the ACF ceased operations in September 1988 through 1989, defense costs were $50 million. During the same time, Fibreboard agreed to pay $25 million in settlements, yielding a ration of 2:1 between defense costs and settlement amounts. In contrast, during 1990 annual defense costs were $52 million and Fibreboard settled cases under the SSP amounting to $45 million, a defense to indemnity ration of somewhat more than 1:1, but found itself increasingly drawn into major consolidated trials. Under the assignment settlement program in 1991 and 1992, the ratio of defense costs to settlement amounts was quite low. Defense costs were $26 million in 1991 and $21 million in 1992, while settlement agreements in those years totaled, respectively, $261 million and $943 million. In these years, settlement amounts were substantially higher than would have been paid had Fibreboard been settling with cash, and thereby minimized litigation activity and defense costs. The resulting paper indemnity commitments were relatively high and defense costs were relatively low. Tr. at 230-31; Fibreboard Exh. 919 (Tab 3). The Court finds that Fibreboard's defense costs during the years of the assignment settlement program are not useful to predict Fibreboard's defense costs under the Trilateral Settlement scenario. The Court finds that Fibreboard's pre-1991 experience is probative on this issue.

236. The Court finds that defense costs under the Trilateral Settlement scenario would be very substantial. In the early years of the Trilateral Settlement, it is likely that Fibreboard would spend more on defense costs than on indemnity payments. Tr. at 621-22. While defense costs would vary depending on changes in corporate defense strategy, those costs would markedly reduce the net amount available to

injured class members under the Trilateral Settlement. Tr. at 432-35.

237. Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust in contrast to the 33%-40% fees claimants' attorneys' would often recover under the Trilateral Settlement --thus increasing the compensation that is provided to claimants rather than the their lawyers. Tr. at 379-81.

238. Additionally, the Court finds that, under the Global Settlement, the operation of the Trust pursuant to the Trust Agreement and TDP will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. Continental Exh. 40 at ¶¶ 8-13. As or more importantly, the Court finds that operation of the Trust under the Global Settlement will as it is designed and intended to do provide a fair method for compensating claimants against the Trust that is more efficient and less burdensome than those claimants would experience under the tort system. This Court finds, based on the credible evidence, that the Global Settlement will largely mitigate or eliminate the "race to the courthouse" among plaintiffs' lawyers that could well occur under the Trilateral Settlement, and that would likely result in the inequitable distribution of settlement funds to claimants. Tr. at 914-16, 924-25. Accordingly, this Court finds that the Global Settlement will substantially reduce the risk that would otherwise exist under the tort system that later claimants will receive no compensation for their claims, or only a fraction of

the compensation that earlier comparable claimants will receive. Tr. at 2058-60; Continental Exhs. 37B-37D, 40.

239. This Court finds that the Global Settlement will eliminate the unpredictable and sometimes unfair results that have been -- and under the Trilateral Settlement would continue to be -- experienced in the tort system.

240. Finally, the Court is aware of, and takes judicial notice of, the various legislative proposals currently under consideration in the United States Congress that could substantially alter the operation of the tort system itself. See, e.g., H.R. 10 (the "Common Sense Legal Reforms Act of 1995"), 104th Cong., 1st Sess. § 103 (1995). Accordingly, this Court finds that there is real uncertainty as to the future ability of asbestos claimants to recover compensation in the tort system, an uncertainty that the Global Settlement mitigates. Tr. at 911-13, 2770.

241. Although this Court finds that the Global Settlement is far preferable to the Trilateral Settlement from the point of view of all class members, this Court also finds that the Trilateral Settlement is far preferable to no settlement at all -- i.e., to a return to the appeal of the Coverage Case. The credible evidence is overwhelming in support of this finding.

242. Simply stated, the question is whether -- from the standpoint of class members it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the Coverage Case appeal and the possibility, regardless of the

outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and -- given Fibreboard's limited non-insurance assets -- the devastating effect that such outcomes would have on class members, this Court finds that the answer is clear: the Trilateral Settlement is far superior to no settlement at all. Tr. at 913-14.

243. A fortiori, for all the reasons this Court has found, supra, that the Global Settlement is preferable to the Trilateral Settlement, Findings of Fact ¶¶ 231-242, together with the fact that the Global Settlement -- like the Trilateral Settlement -avoids the significant risk of a Fibreboard loss of the Coverage Case, Tr. at 771-93, this Court finds that the Global Settlement is a far preferable to the Coverage Case scenario.

IX. ADDITIONAL FAIRNESS CONSIDERATIONS

A. Operation of the Trust

244. The Court has carefully considered both the terms and operation of the Trust Agreement and the TDP. Dr. Peterson has testified, and the Court finds, that the Trust Agreement and TDP fairly reflect the most modern and sophisticated thinking, making effective use of the information gleaned from prior experience to improve on claims-payment trusts created in other proceedings. Tr. at 2066-77. The Court finds that the Trust Agreement and TDP, taken together as a whole, and with respect to each of their provisions, are fair, reasonable and adequate.

245. The Court finds that the TDP provisions that require that claimants against the Trust first pursue informal avenues for resolving their disputes before bringing them to the tort system provide affirmative benefits both the members of the Global Health Claimant Class and the judicial system itself. These provisions constitute, in effect, alternative dispute resolution mechanisms that are substantially more efficient than the tort system. Tr. at 374-77, 380-83. Accordingly, the Court finds that the fact that those claimants who ultimately exercise their back-end right to pursue claims in the tort system first have to seek informal resolution of their claims is not a significant detriment to the class.

246. Where the need to preserve funds makes it impossible to pay all claims without deferral, the TDP seeks to give priority to those who are most seriously ill -- paying mesothelioma victims first, then asbestos-related lung cancer victims, then other cancer victims, and then those with nonmalignant conditions defined in order of priority as Asbestos Lung Disease-1 ("ALD-1") and Asbestos Lung Disease-2 ("ALD-2"). Fibreboard Exh. 912 (TDP) at 23-25, § F.2.

247. Dr. Richard Kradin, a board certified specialist in pathology, pulmonary medicine and internal medicine, testified without contradiction that the requirements imposed under the Global Settlement for establishing medical diagnoses are reasonable, and that the required test procedures are widely available. Tr. at 531-34, 543-44, 550-51. Dr. Kradin also agreed that the disease process described in the TDP as ALD-1 is, generally speaking, more serious than that described in ALD-2, that the definitions of these disease processes adopted by the agreement are fair and reasonable, Tr. at 545,

and that they encompass all nonmalignant asbestos-related effects that are accepted in the medical and scientific community. Tr. at 546. The definition of mesothelioma is, perhaps, over-inclusive. Tr. at 547. The definition of asbestos-related lung cancer in the agreement is the broadest definition acceptable to the medical and scientific communities -- the most liberal view from the claimant's perspective. Tr. at 548.

248. The Court credits Dr. Kradin's testimony and adopts his conclusion that the disease categories set forth in the TDP fairly reflect the medically recognized categories of asbestos-related diseases, and fairly account for the relative seriousness of the respective conditions.

249. Dr. Bradford Cornell, an expert in finance and computer simulations of financial models, testified about the Trust's operation and capacity to pay claims under various assumptions. Tr. at 1668, 1671-73; Fibreboard Exh. 920. Those assumptions included the average settlement values estimated by Plaintiff's Counsel and the claims projections made by Dr. Nicholson and others. Tr. at 1686-91; Class Plaintiffs Exhs. 1017-1021. These simulations required Dr. Cornell to project the Trust's earning capacity over the next forty years. Since such a projection of future earnings, of course, cannot be quantified with precision, Dr. Cornell presented a series of alternative projections of Trust earnings depending upon what the economic conditions might be over the next forty years, and the likelihood of experiencing different kinds of economic conditions over that period. Class Plaintiffs Exhs. 1019-1021; Fibreboard Exhs. 921, 922A922D.

250. The Settling Parties asked Dr. Cornell to model the claims payment and spendthrift provisions of the Trust and, after doing so, to run the projections made by Plaintiff's Counsel and Dr. Nicholson, Dr. Peterson, the Ortiz Intervenors and Professor Eric D. Green (the Guardian Ad Litem for the Global Health Claimant Class, see Findings of Fact ¶¶ 377-397). His resulting calculations demonstrated that the Trust will be able to pay all claims as they are submitted, assuming:

(1) the more likely economic conditions will prevail over the next 40 years;

(2) case settlement values will approximate the analysis made by the Plaintiffs' Counsel; and

(3) the future number of cases will be at or just beyond the upper end of Dr. Nicholson's projections.

Tr. at 1699-1707; Class Plaintiffs Exhs. 1017-1021.

251. As noted, predictions about the future are fraught with uncertainty. As Dr. Cornell has made clear, there is always a possibility that the economic environment over the next forty years might be significantly less advantageous than it has been over the past forty years, or that adverse economic conditions might prevail during the first few years of the Trust's existence, when it has the most money on hand and the largest number of claims to pay. If so, then the Trust might well find itself unable to pay all the claims filed against it. Tr. at 1707; Class Plaintiffs Exh. 1021. Similarly, if the current projections

of future claims are underestimated, or if settlement values prove higher than now estimated, there could well be insufficient funds in the Trust to pay all claims. Class Plaintiffs Exh. 1020. In those circumstances, the TDP will favor those claimants with the most serious illnesses. Fibreboard Exh. 912 (TDP) at § F.

252. The Court finds that the Trust Agreement and TDP reflect the considered and correct judgment of the Settling Parties that it is necessary and appropriate to preserve Trust assets so that fair compensation is paid not only to claimants who contract asbestos-related diseases in earlier years, but also to those who contract diseases in later years. The Court finds that it is fair and reasonable for the Settling Parties to seek to accomplish this end.

253. The Court finds that the spendthrift provisions of the Trust are reasonably and carefully crafted to seek to achieve the objective of providing fair compensation to all claimants.

254. Three initial trustees have been selected and have agreed to oversee the Trust. Professor Francis McGovern, of the University of Alabama, is known to this Court and to both Plaintiffs' and defendants' attorneys in asbestos litigation as a distinguished law professor in the field of mass torts. His experience includes service as a special master in the Baltimore and Ohio asbestos litigation cases. Tr. at 39394. Charles Renfrew is a former United States District Court Judge in the Northern District of California, a distinguished member of the California bar, and a former Justice Department official and General Counsel of Standard Oil Company. Tr. at 394. The third trustee is Henry Ramsey, Jr.

Judge Ramsey was a Superior Court Judge in Oakland, California, where he presided over and managed the entire Alameda County asbestos docket. For several years he has been Dean of the Howard University Law School. Tr. at 394. The Court finds that Professor McGovern and Judges Renfrew and Ramsey are eminently qualified to serve at trustees of the Trust created pursuant to the Global Settlement.

B. Limitations on Claims Against the Trust

255. As discussed herein, Findings of Fact ¶¶ 200217, the members of the Global Health Claimant Class agreed in the Global Settlement to, among other things: (i) a waiver of their rights (if any) to receive punitive damages from the Trust; (ii) a cap on recoveries against the Trust of $500,000 per claimant; (iii) a waiver of their rights (if any) to recover preand post-judgment interest on awards against the Trust; and (iv) a limit on their ability to recover against the Trust to Fibreboard's several share of liability. These bargained-for concessions by the Global Health Claimant Class serve to preserve the Trust corpus from a few individual and/or early demands that could have the effect of reducing all class members' claims.

256. In light of Fibreboard's history, this Court finds that the waiver of punitive damages is not a significant concession. As previously found, Findings of Fact ¶ 25, with possibly one exception Fibreboard has never paid punitive damages in the tort system. In the few instances where juries have awarded punitive damages against Fibreboard, the cases were ultimately settled for amounts that substantially or entirely discounted the punitive damages component. Tr. at 399400,

1037-38. Moreover, to whatever extent the risk or actual jury award of punitive damages have affected the values of settlements with Fibreboard, that effect is reflected in the historic settlement values that the parties considered in negotiating the Global Settlement, and the trustees of the Trust will have that information available to them in making offers to individual Global Health Claimant Class members. Tr. at 402, 1037-38.

257. This Court finds that the limitation of awards to $500,000 per claimant is also, as a practical matter, a small concession on the part of the Global Health Claimant Class. Tr. at 940-41. In Fibreboard's history there have been approximately twelve individual settlements by Fibreboard in excess of $500,000. Tr. at 401. The $500,000 cap also reasonably reflects the maximum exposure, per claimant, that the Insurers could have faced under their respective policies. Under the circumstances, the Court finds credible and adopts Plaintiffs' Counsel's testimony that the practical impact of the $500,000 limitation is small and the limitation is fair to the class as a whole. Tr. at 940-41.

258. This Court finds that the waiver of pre- and post-judgment interest is fair in light of the structure of the Global Settlement. This Court finds that the Global Settlement is designed to provide significantly faster and more efficient resolution of asbestos claims than the tort system, with significantly less transaction costs and greater certainty of fair compensation being paid within a reasonable period of time. The Court takes judicial notice that prejudgment interest is not available in all states, and postjudgment interest is a remedy available only after a claimant has brought his or her case to trial

-- sometimes on dockets with long delays. The Court finds that, under the circumstances, the Trust provides more value to members of the Global Health Claimant Class than they would receive in the tort system, even considering interest. Tr. at 1160.

259. This Court finds that the agreement by the Global Health Claimant Class to limit claims against the Trust to several liability is a fair exchange for the large and certain corpus of money the Global Settlement makes available to pay Global Health Claimant Class members. To the extent that Fibreboard's potential exposure under the principle of joint and several liability for damage caused by other asbestos manufacturers affected the historic settlement values of claims against Fibreboard, those values are reflected in the overall settlement amount and in the information the trustees can consider in evaluating claims. Tr. at 402.

C. Fibreboard's Contributions to the Settlement and the Insurers' Insistence on "Total Peace"

260. This Court finds that it is entirely fair and reasonable for Fibreboard to have insisted throughout the course of negotiations as an absolute precondition to reaching a global settlement -- that any such settlement be effected without Fibreboard contributing its non-insurance assets (except in the event the Coverage Case appeal went forward and Fibreboard lost that appeal). This Court further finds that Plaintiffs' Counsel acted reasonably in acceding to this precondition. The Court also finds that it was also entirely fair and reasonable for the Insurers to have made as an equally absolute precondition that this settlement provide them with "total peace," and for

Plaintiffs' Counsel to have acceded to that precondition. As previously found, Findings of Fact ¶¶ 125, 129, 255-259, these preconditions were not only essential to reaching an agreement that provides the Global Health Claimant Class with enormous benefits, they work no real detriment to the class.

261. On April 9, 1993, well before the parties had any reason for confidence about the prospects for reaching a global settlement, Continental bound itself to seek to achieve a global settlement that would be paid solely through Fibreboard's insurance resources. The Court finds that, as a direct consequence of the April 9 Agreement, the Global Health Claimant Class received at least an additional $200 million, a sum roughly approximating Fibreboard's corporate worth. That sum was paid on Fibreboard's behalf. Tr. at 1447-50. The Court finds that this contribution was made by the Insurers late in the negotiations, and that it was instrumental in bringing the negotiations to a close.

262. The Court finds, further, that Fibreboard's contribution to the Global Settlement included the skillful conduct of bitterly contested insurance coverage and ancillary litigation, an effort that converted a unique and potentially limited insurance asset into a settlement fund that is many times larger than Fibreboard's entire net worth, and which even provides compensation for otherwise uninsured claims. Fibreboard's efforts to reach a resolution of its asbestos-related liabilities within insurance resources entailed substantial risks to Fibreboard, including the incurring of debt much greater than Fibreboard's net worth, the risk of the assignment litigation, the relinquishing of all of Fibreboard's leverage in the April 9 Agreement in return for Continental's agreement to use its "best

efforts" to accomplish a global settlement within Fibreboard's insurance resources, and acceptance of the Trilateral Settlement as a back-up to the Global Settlement. Finding of Fact ¶¶ 75-82, 91, 128-131, 177. Taking these steps put Fibreboard's corporate existence in jeopardy, and made it reasonable for Fibreboard to insist, in return, that this settlement be funded soley by insurance funds. Tr. at 1163-65.

263. The Court finds that Fibreboard made other valuable contributions to the Global Settlement as well, including, e.g., an undertaking to provide case processing services to the Trust and an assignment of existing contribution claims to the Trust. Findings of Fact ¶ 180.

264. The Court further finds that the factual predicate for putting Fibreboard into an involuntary bankruptcy proceeding pursuant to Section 303 of the Bankruptcy Code of 1986 i.e., that there exist at least three creditors that have claims that are due and unpaid and are in the aggregate unsecured to the extent of at least $5,000 could not be satisfied, either now or at any time during the negotiations that led to this settlement. Fibreboard has at all times carefully structured its settlements, for example, so that payments were not presently due on them, and was paying their other creditors in a timely fashion. Tr. at 1536-37. The Court finds that Fibreboard made a prudent business judgment when it determined not to seek bankruptcy protection as a means of resolving its asbestos-related liabilities. Tr. at 276-78.

265. Based on the credible evidence, including the testimony of an investment banker,[29] the Court finds that a financially prudent buyer would not pay more than approximately $237 million to acquire Fibreboard free of all of its personal injury asbestos liabilities. The costs to Fibreboard of such a transaction would be at least $2 million, leaving a maximum net acquisition value ("Sale Value") of $235 million. Tr. at 247-49, 262, 272. Fibreboard's Sale Value, which far exceeds its current stock market value, fully takes account of the company's future prospects and the above-book values inherent in its timber assets. There is no basis for the Court to find that Fibreboard will ever be worth more in the future, in current dollars, than it is today. Tr. at 269-72, 282-84.

266. Counsel for the Ortiz intervenors asserted that this valuation was too low by $40 million to $50 million. Tr. at 294. Although there was no credible evidence to support this assertion, a difference in value of that order of magnitude would be irrelevant to the issues before the Court because, even if true, the company's asbestos liabilities, including more than $1 billion of liquidated settlement debt as of August 1993, nevertheless dwarfed the company's assets. Tr. at 486-87; Fibreboard Exh. 919 (Chart 3).

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[29]The Insurers presented the testimony of Richard Clark Abbott, an investment banker. Mr. Abbott is the managing director of Riverway Capital Partners, in Houston, a partnership that focuses on financial advice and investment. For 13 years, Mr. Abbott worked for the international investment banking firm of Morgan Stanley. Mr. Abbott is an expert in corporate finance and mergers and acquisitions, with extensive experience in valuing companies for the purpose of rendering fairness opinions and in advising and managing financially troubled corporations. Tr. at 242-46, 275-76; Continental Exh. 1. He is experienced in advising and raising money for a broad range of corporations, including forest product companies. Tr. at 243.

267. The Court finds that the sources and components of the settlement fund before the Court are factually irrelevant to assessing the fairness of the Global Settlement, but that -- in any event Fibreboard's contribution was both substantial and essential to achieving the result before the Court.

268. The Court also finds that it was entirely reasonable for the Insurers to have insisted that their enormous corporate contributions to this settlement obtain repose for them, and for Plaintiffs' Counsel to have acceded to this requirement. Certainty the ability to calculate their losses and to know that they will pay for this settlement is the principal benefit the Insurers obtain from this settlement. Tr. at 923, 1490-92, 1570, 1604.

D. Changed Circumstances

269. In view of the parties' expectation that the Coverage Case would in any event progress in the California courts without them, thereby changing the circumstances that existed on August 27, 1993, the Global Settlement Agreement specified that the fairness of the Global Settlement is to be viewed as of August 27, 1993, the date on which the agreement in principle was reached. Fibreboard Exh. 912 (Global Settlement Agreement) at § 8.7. The Court is of the view that the appropriate time to view the fairness and adequacy of the Global Settlement is as of August 27, 1993, and the Court has done so herein. Since the conclusion of the Global Settlement agreement in principle of August 27, 1993, significant litigation developments have occurred, however, that had they occurred prior to the conclusion of a settlement could have significantly altered the negotiating landscape. Moreover, these events would

likely have a substantial impact on the behavior of the Settling Parties should the Global Settlement fail to receive final court approval. Accordingly, even if the Court were to assess the fairness of the Global Settlement as of today, these developments provide further compelling evidence that the Global Settlement is fair and should be approved.

270. First, on January 27, 1994, petitions for review of the California Court of Appeal's decision in the Coverage Case were granted by the California Supreme Court on a "grant and hold" basis, the effect of which is that the appeal is presently held in abeyance while the California Supreme Court considers issues in other pending appeals that may be dispositive of issues in the Coverage Case. Fibreboard Exh. 259. Findings of Fact ¶ 47. On July 5, 1995, the California Supreme Court determined that a continuous trigger applies in third-party general liability policies. The court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 1995 WL 389860 at n. 16, _ Cal. Rptr. 2d_, _n. 16 (1995).

271. Second, on October 19, 1994, the California Court of Appeal reversed the decision of the Alameda County Superior Court in the Andrus case, and held that Fibreboard did not have the right to enter into assignment settlement agreements. Tr. at 207; Fibreboard Exh. 336. Fibreboard petitioned the California Supreme Court for review of the Court of Appeal's decision in Andrus, and, on January 4,

1995, the California Supreme Court denied that petition for review. Accordingly, the Court of Appeal's reversal of the trial court decision in Andrus is now final. Tr. at 1515-16; Fibreboard Exh. 337.

272. The Montrose decision notwithstanding, this Court finds that it is doubtful whether Continental would have been willing to agree to a global settlement price of $1.525 billion had the California Supreme Court's grant of review in the Coverage Case and the reversal in Andrus taken place before the conclusion of global settlement negotiations. Tr. at 1518-19. Likewise, the Court finds that, in light of these changed circumstances, were the Global Settlement to fail to receive approval, there is substantial possibility that Continental would no longer be willing to pay $1.525 billion for this settlement. Tr. at 1518-19. Indeed, Continental's counsel indicated at the fairness hearing that were the Global and Trilateral Settlements to fail to obtain the necessary court approvals, Continental's position would be that the assignment settlements constituted a material breach of Fibreboard's insurance policy so as to relieve Continental of any obligations under that policy. Tr. at 1515-16, 1545. Fibreboard disputes both Continental's position in this regard, and -in view of the April 9 Agreement -Continental's right to assert such position.

E. Rule 23 (b)

273. The Court finds that the prosecution of separate actions by or against individual members of the Global Health Claimant Class or Global Third-Party Claimant Class would create a risk of inconsistent or varying adjudications with respect to individual members of each such class which would

establish incompatible standards of conduct for the parties opposing those classes.

274. The Court finds that the prosecution of separate actions by or against individual members of the Global Health Claimant Class or Global Third-Party Claimant Class would create a risk of adjudications with respect to individual members of each such class which would as a practical matter be dispositive of the interests of the other members of those classes not parties to the adjudications or substantially impair or impede their ability to protect their interests.

275. The Court finds that the parties opposing the Global Health Claimant Class, Global Third-Party Claimant Class and the Longshore Defendant Class have acted or refused to act on grounds generally applicable to each of those classes, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the classes as a whole.

X. THE CLASSES AND CLASS REPRESENTATIVES

A. The Classes

276. The Court adopts and incorporates herein the definitions of the Global Health Claimant Class and the Global Third-Party Claimant Class as set forth in the Court's Order Finally Certifying Plaintiff and Defendant Classes.

277. The Court adopts and incorporates herein the definition of the Longshore Defendant Class as set forth in

the Court's Order Finally Certifying Longshore Defendant Class.

278. The Global Health Claimant Class contains in excess of 100,000 potential claimants. Tr. at 858, 1417. The Global Third-Party Claimant Class contains in excess of two thousand potential claimants. Continental Exh. 45 at 8, ¶ 14.

The Longshore Defendant Class contains at least several thousand members. Affidavit of Peter Van N. Lockwood, sworn to January 31, 1995 ("Lockwood Aff."), Dkt. No. 713, at ¶ 13. This Court finds that, as to each of these classes, the class is so numerous that joinder of all of its members is impracticable. This Court further finds that, as to each of these classes, there are questions of law or fact common to the class.

B. The Class Representatives

1. Global Health Claimant Class Representatives

279. Global Health Claimant Class representative Gerald J. Ahearn, Sr., resides in the state of South Carolina. Mr. Ahearn allege that he was exposed to asbestos-containing products, including products manufactured or supplied by Fibreboard, during the course of his employment at the Charleston Naval Shipyard in Charleston, South Carolina,

during and after the 1940s. Mr. Ahearn has contracted asbestosis, which he alleges is the direct and proximate result of this asbestos exposure. Class Plaintiffs Exhs. 1009, 1024.

280. Global Health Claimant Class representative James R. Dennis resides in the state of South Carolina. Mr. Dennis alleges that he was exposed to asbestos-containing products, including products manufactured or supplied by Fibreboard, during the course of his employment at Delta Air Lines from 1968 to 1970, and during his employment as a pipefitter in various shipyards in Charleston, South Carolina. Mr. Dennis has contracted asbestosis, which he alleges to be a direct and proximate result of that exposure. Class Plaintiffs Exhs. 1008, 1025.

281. Global Health Claimant Class representative Charles W. Jeep resides in the state of Missouri. Mr. Jeep alleges that he was exposed to asbestos-containing products during the course of his employment at the Puget Sound Naval Shipyard from 1944 to 1946. It is his current understanding that those product included products manufactured or supplied by Fibreboard. Mr. Jeep has contracted mesothelioma. Class Plaintiffs Exhs. 1008, 1026.

282. On September 4, 1993, Messrs. Ahearn, Dennis and Jeep each retained the Ness Motley firm to pursue any actions they might have for their asbestos-related diseases. On or about September 7, 1993, Messrs. Ahearn, Dennis and Jeep were contacted by Mr. Cox, who discussed with each of them that an agreement in principle had been reached with Fibreboard, Continental and Pacific, on or about August 27, 1993, to resolve Fibreboard's asbestos liabilities. After

consultation with Mr. Cox, Messrs. Ahearn, Dennis and Jeep each agreed to serve as a class representative in a class action to be filed in this Court. Class Plaintiffs Exhs. 1024-1026; Tr. at 1169-70.

283. On or about December 21, 1993, Mr. Cox and Peter Lockwood (of Caplin & Drysdale) met with Messrs. Ahearn, Dennis and Jeep to explain the proposed Global Settlement Agreement and to seek their authorization to sign the final documents detailing the Global Settlement. After full explanation, Messrs. Ahearn, Dennis and Jeep each authorized Messrs. Cox and Lockwood to sign the agreement on their behalf. Mr. Cox subsequently provided Messrs. Ahearn, Dennis and Jeep, on or about January 12, 1994, with copies of the Global Settlement Agreement, the Trust Agreement, the TDP, and the Glossary. Class Plaintiffs Exhs. 1024-1026; Tr. at 117071.

284. Messrs. Ahearn, Dennis and Jeep each believes that the Global Settlement is a fair settlement that will provide substantial benefits to persons injured by Fibreboard's asbestos-containing products. They each understand that, under the Global Settlement, they and the other class members cannot seek punitive damages or awards of more than $500,000 against the Trust. This does not change their belief that the settlement is fair. Messrs. Ahearn, Dennis and Jeep each understand that an agreement in principle had been reached to settle Fibreboard's liabilities to class members prior to the filing of this action. They have no objection to this procedure, and it does not change their belief that the settlement is fair. They each understand that there is a possibility that, under the settlement, payments to them or to other class members might

be delayed under certain circumstances, and that the settlement provides that persons with more serious diseases, such as cancer, will be paid first if delays become necessary. This does not change their belief that the settlement is fair. Class Plaintiffs Exhs. 1024-1026.

285. Global Health Claimant Class representative William James Mitchell resides in the state of Kentucky. Mr. Mitchell was employed by Henderson Power & Light, in Henderson, Kentucky, between 1951 and 1987. During that time, Mr. Mitchell alleges that he was exposed to asbestoscontaining products (including pipe covering, block, cement and other products) as a boiler operator, lab operator, turbine operator, and as an assistant superintendent. Mr Mitchell believes hat he may have been exposed to asbestoscontaining products manufactured by Fibreboard. Mr. Mitchell is not presently aware of having any asbestos-related disease or condition. Class Plaintiffs Exhs. 1027.

286. On or about December 9, 1994, Mr. Mitchell spoke with P. Jay Cone, II, of the Ness Motley firm. Mr. Cone explained the instant class action to Mr. Mitchell, and Mr. Mitchell agreed to serve as class representative. Class Plaintiffs Exhs. 1027; Tr. at 1173.

287. Global Health Claimant Class representative James Ellison is a former employee of Bethlehem Steel Corporation who worked at the Bethlehem Shipyard in Port Arthur, Texas from 1955 to 1984. Mr. Ellison alleges that he was exposed to asbestos-containing products manufactured or distributed by Fibreboard, and that such exposure was the proximate cause of his lung cancer. He claims that he is entitled

to damages from Fibreboard and to compensation under LHWCA from Bethlehem. Lockwood Aff. at ¶ 7.

288. In sum, the Global Health Claimant Class representatives hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions and exposure to Fibreboard asbestos. They are all members of the Global Health Claimant Class, and fairly reflect the relevant interests of the class. This Court finds that the Global Health Claimant Class representatives have fairly and adequately protected the interests of the Global Health Claimant Class. This Court further finds that the claims or defenses of the Global Health Claimant Class representatives are typical of the claims or defenses of the Global Health Claimant Class.

2. Global Third-Party Claimant Class Representatives

289. Owens-Illinois is well known to this Court, and to all judges experienced in asbestos litigation, as one of the most frequently sued asbestos defendants. OwensIllinois received between 17,000 and 20,000 asbestos personal injury claims per year between 1991 and 1993. Tr. at 2677. The company is, like Fibreboard, known in the asbestos litigation as a "pipe and boiler" defendant. Tr. at 168. It has been a member of the MDL Defense Steering Committee

formed by Judge Weiner. Tr. at 403. Owens-Illinois has litigated many asbestos injury cases through trial and on appeal. Srite v. Owens-Illinois, Inc., 870 S.W.2d 556 (Tex. Ct. App. 1993), rev'd in part sub nom. Owens-Illinois, Inc. v. Estate of Burt, 897 S.W.2d 765 (Tex. 1995); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992). It has considerable experience in dealing with settlement set-off and credit issues. Tr. at 1195.

290. Owens-Illinois took a strong position and objected vigorously to the Georgine settlement which, unlike the Third-Party Claimant Class Settlement here, did not protect third-party credit and set-off concerns. Tr. at 1195. It took a similar position in protection of third-party interests in the Manville litigation. Tr. at 1513; In re Joint Eastern and Southern Districts Asbestos Litigation ("Manville"), 982 F.2d 721 (2d Cir. 1992), mod'd, 993 F.2d 7 (2d Cir. 1993). Fibreboard and Plaintiffs' Counsel met with Owens-Illinois representatives, and with others on the MDL Defense Steering Committee, to discuss and explain the operation of the Trust created by the Global Settlement. Tr. at 403, 1511-12.

Owens-Illinois and other Steering Committee members expressed well-understood concerns (i) that all money paid by the Trust be available to Fibreboard's co-defendants where appropriate as credits and set-offs in the tort system; and (ii) that the set-off and credit calculation mechanism be fair. This was the first time in the history of the asbestos litigation that co-defendants had been invited to the bargaining table in a comparable situation. Tr. at 403.

291. This Court finds the Owens-Illinois has fairly and adequately protected the interests of the Global Third-Party Claimant Class. This Court further finds that Owens-Illinois' claims or defenses are typical of the claims or defenses of the Global Third-Party Claimant Class.

3. Longshore Defendant Class Representative

292. Bethlehem Steel Corporation is one of the largest industrial corporations in the United States, which, through its ownership and operation of shipyards, is regularly subject to claims by its employees for compensation under LHWCA. Those claims -- thousands of which have been filed against Bethlehem -- include over 1,000 claims arising from asbestos-related diseases or deaths caused by exposure to asbestos-containing products (including products manufactured or distributed by Fibreboard) utilized by Bethlehem employees such as Global Health Claimant Class representative Ellison while working for Bethlehem. Bethlehem is a self-insured employer, and, as such, is for LHWCA purposes both an employer and an insurance carrier. Lockwood Aff. at ¶ 16; Affidavit of Donald S. Bauman, sworn to January 30, 1995

("Bauman Aff."), Dkt. No. 712, at ¶¶ 4, 5; 33 U.S.C. §§ 902(5), 932(a)(2). This Court finds that Bethlehem has fairly and adequately protected the interests of the Longshore Defendant Class. This Court further finds that Bethlehem's claims or defenses are typical of the claims or defenses of the Longshore Defendant Class.

XI. ADEQUACY OF CLASS COUNSEL

A. Global Health Claimant Class Counsel

293. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. law firms representing asbestos claimants. The Ness Motley firm has been involved in approximately 50% of all asbestos claims in the United States. Tr. at 1455. Mr. Kazan is a partner with the law firm Kazan, McClain, Edises & Simon. He has been involved in asbestos-related cases since the mid-1970s. The majority of his practice involves the representation of asbestos victims. Tr. at 899-901. Mr. Wartnick is a member of the law firm Wartnick, Chaber, Harowitz, Smith & Tigerman. Since 1981 his practice has been devoted primarily to representing asbestos claimants. Tr. at 642.

294. In considering with whom to negotiate a global settlement, Fibreboard and later, the Insurers and this Court took into account the prominence the Ness Motley firm and Messrs. Kazan and Wartnick had in the area of asbestos litigation. Tr. at 212-14, 1454-55. The Ness Motley firm was seen as necessary to any successful global settlement, in that the firm had been involved in most major litigations with Fibreboard since 1990, served as class counsel in Linscomb, was serving as

co-lead counsel in the MDL proceedings, and Messrs. Motley and Rice had been serving as class counsel in Georgine. Accordingly, the Ness Motley firm had substantial credibility among the members of the plaintiffs' bar. Tr. at 212, 145455; Georgine, supra, 157 F.R.D. 246. Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located and where it faced major liabilities. They were among the most knowledgeable counsel with respect to Fibreboard and were viewed as such by their colleagues. Tr. at 214, 1454.

295. Although during late Spring of 1993, when global settlement negotiations had stalled, Continental considered seeking to negotiate with other counsel for asbestos claimants, Continental concluded that Messrs. Rice, Cox, Kazan and Wartnick were the appropriate and necessary negotiating counsel. This conclusion was based on Ness Motley's degree of participation nationally in asbestos claims and the respect for that firm, the prominence of Messrs. Kazan and Wartnick on the West Coast and the degree of respect for their firms, and the fact that an attempt to recommence negotiations with other counsel would be viewed as an attempt to avoid the lawyers who were representing asbestos claimants' interests most aggressively. Tr. at 1456-57.

296. This Court has had extensive experience with, and knowledge of, Messrs. Rice, Cox and Kazan, and had been advised of Mr. Wartnick's historical involvement in prosecuting asbestos personal injury cases against Fibreboard, prior to August 9, 1993. This Court finds that Messrs. Rice, Cox, Kazan and Wartnick are prominent attorneys, highly respected for their knowledge, experience, skill and special

competence in the field of asbestos litigation.[30] This Court further finds that Fibreboard chose to negotiate with these counsel -and this selection was ratified by the Insurers and this Court -based on their reputations, experience and extensive involvement in asbestos litigation. These characteristics of Plaintiffs' Counsel were what led this Court to formally appoint them as negotiating counsel for the Global Health Claimant Class. This Court finds that Plaintiffs' Counsel have provided adequate, professional and ethical representation to the Global Health Claimant Class.

297. Plaintiffs' Counsel have been well served by their retention of Caplin & Drysdale, who have advised them in areas outside their own expertise and worked side by side with them throughout the negotiations with Fibreboard and the Insurers. Tr. at 647, 1550. Caplin & Drysdale is widely recognized as a highly effective law firm, with expertise in a broad range of complex areas. Tr. at 1556, 2127-28, 2345. In addition, Caplin & Drysdale, and particularly the principal lawyers involved in this case Messrs. Inselbuch and Lockwood have extensive experience in the field of asbestos litigation, although they have not represented individual health claimants. Tr. at 1556, 1772. Mr. Inselbuch represented the Asbestos Health Claimants Committee in the Manville bankruptcy from

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[30]Mr. Leonard Jaques, Esq., has asserted an objection to this settlement on the ground that "[c]ounsel for the named plaintiffs are not qualified to represent these Maritime Claimants in the specialized field of martitime law." Objections to Proposed Global Settlement by the Maritime Intervenors, Dkt. No 395 (Oct. 31, 1994), at 5. Mr. Jaques presented no evidence in support of this objection, and the Court finds that there is no such evidence in the record. Indeed, the evidence is to the contrary. Tr. at 1004-05. Accordingly, this objection is rejected.

October 1985 through confirmation and consummation of the Manville Plan of Reorganization in 1988, and has represented the class of beneficiaries of the Manville trust in the restructuring litigation. See Kane v. JohnsManville Corp., 843 F.2d 636 (2d Cir. 1988) and Manville, supra, 982 F.2d 721 (2d Cir. 1992). The Court finds that Caplin & Drysdale is a highly experienced and qualified firm, whose participation in these negotiations materially benefitted the Global Health Claimant Class.

B. Global Third-Party Claimant Class Counsel

298. Owens-Illinois' counsel in this action, R. Bruce Shaw, of the law firm of Nelson, Mullins, Riley & Scarborough, and Richard L. Josephson, of the law firm of Baker & Botts, L.L.P., are among the best and most qualified attorneys representing defendants in asbestos-related litigation. Tr. at 1196. This Court finds that these counsel have provided adequate representation to the Global Third-Party Claimant Class.

C. Longshore Defendant Class Counsel

299. Bethlehem is represented before this Court by its Labor Counsel, Donald S. Bauman. Mr. Bauman has responsibility at Bethlehem for, inter alia, LHWCA and workers' compensation matters, and is thus experienced in this area of the law. Bauman Aff. at ¶ 1. This Court finds that Mr. Bauman has provided adequate representation to the Longshore Defendant Class.

XII. ETHICAL CONSIDERATIONS

300. The Ortiz Intervenors raise two categories of objections with respect to Plaintiffs' Counsel that they assert implicate questions of legal ethics and professional responsibility.[31] First, the Ortiz Intervenors argue that Plaintiffs' Counsel had an impermissible conflict of interest arising out of their simultaneous representation of present and future asbestos claimants. Second, the Ortiz Intervenors argue that there were conflicts of interest within the Global Health Claimant Class -which this Court will label "intraclass" conflicts -which they initially argued required separate subclasses. Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 26, 1994). At the fairness hearing, however, the Ortiz Intervenors -through the testimony of their ethics expert -appeared to retreat from their position that subclasses were needed, and asserted that the varying interests of the future class members required instead that there should have been lawyers representing all of the individual interests during the negotiation

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[31]The Flanagan Intervenors have raised some of the same objections. Objections to Proposed Global Settlement By the Maritime Objectors, Dkt. No. 395 (Oct. 31, 1994). The Court's findings of fact and conclusions of law apply equally with respect to their objections. Mr. Jaques, counsel to the Flanagan Intervenors, has also asserted an additional argument regarding the ethical conduct of Plaintiffs' Counsel. Mr. Jaques asserts that the Settling Parties violated "ethical canons" by allegedly "arranging for the appointment of Class Counsel to 'represent' thousands of merchant mariners already known to have retained counsel . . . ." Id. at 4. The Court rejects this argument. This Court - and not the Settling Parties -was responsible for the appointment of Plaintiffs' Counsel to represent the Global Health Claimant Class. Moreover, Judge Weiner has specifically rejected Mr. Jaques's argument that he in fact has been appointed to represent all Maritime Claimants in the MDL 875 action. Order, Georgine, supra (Feb. 24, 1994).

of the settlement. Tr. at 1886-88. The Ortiz Intervenors assert that the presence of these alleged conflicts requires the Court to reject the Ahearn settlement for lack of adequate representation of the Global Health Claimant Class.

301. The Ortiz Intervenors offered Professor John Leubsdorf as an expert witness on these issues. Professor Leubsdorf is a law professor at Rutgers University Law School, and has taught courses in civil procedure and legal professional responsibility. He is a co-author with Professor Geoffrey Hazard of a textbook on civil procedure, and is one of two associate reporters for the American Law Institute's Restatement of the Law Governing Lawyers. Tr. at 1749-50; Ortiz Exh. 12. Although this Court finds that Professor Leubsdorf qualifies as an expert on issues of legal ethics and professional responsibility, it notes that he has had no asbestos litigation experience and has never testified or been consulted or retained as an expert or as counsel in any matter involving mass torts or asbestos litigation.[32] Tr. at 179192; Ortiz Exh. 12.

302. In response, the Settling Parties assert (i) that there was no material limitation on the representation of the Global Health Claimant Class by Plaintiffs' Counsel created by the concurrent representation of present and future claimants; (ii) that Plaintiffs' Counsel reasonably believed that the representation of the Global Health Claimant Class would not be adversely affected; and (iii) that the Court, in approving this

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[32]Professor Leubsdorf was the primary author of an amicus brief submitted by 25 law professors in Georgine. However, the Georgine court did not accept the amicus brief, on the ground that its proponents "have only limited knowledge of the underlying facts and issues before the Court." Order, Georgine, supra (April 11, 1994); Tr. at 1791-92.

settlement on a full record and after close scrutiny, supplied any consent that might have been required on behalf of the absent class members. The Settling Parties further assert that there were no antagonistic interests within the Global Health Claimant Class that would require either subclasses or the separate representatives recommended by Professor Leubsdorf at the fairness hearing. Tr. at 231642.

303. In support of their views, the Settling Parties introduced the expert testimony of Professor Geoffrey Hazard, a nationally recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard is a law professor at the University of Pennsylvania Law School, and is the Director of the American Law Institute. For many years, Professor Hazard taught primarily at Yale Law School in the fields of professional responsibility, legal ethics and civil procedure. Pacific Exh. 3. He is the primary author of The Legal Profession: Responsibility and Regulation and The Law and Ethics of Lawyering, and has authored over one hundred articles, many of which address issues of legal ethics and professional responsibility. Pacific Exh. 3.

304. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation, and is currently an emeritus member of the Rand Institute. He was the Reporter to the Kutak Commission, the body responsible for the preparation of the ABA Model Rules of Professional Conduct. Pacific Exh. 3; Tr. at 2307-12. Moreover, Professor Hazard has extensive experience as a consultant in the fields of professional responsibility and legal ethics, and has previously testified with respect to similar ethics issues in Georgine, where he was

recognized as a competent expert whose opinions were accepted by Judge Reed in his decision in that case. Georgine, supra, 157 F.R.D. at 297. In light of Professor Hazard's extensive experience, training, education and knowledge of issues in this field of expertise, this Court finds he is a competent expert with respect to the issues on which he proffered his opinion in the case.

305. This Court arrived at its findings of fact regarding the ethics issues presented in this action based on a full review of the extensive record developed at the fairness hearing, including both the testimonial and documentary evidence presented. The Court has also heard the views of the Guardian Ad Litem for the Global Health Claimant Class, and read his report on these subjects. After careful consideration of the entire record, and particularly the testimony of both ethics experts and that of the negotiators themselves, this Court credits Professor Hazard's testimony as wholly persuasive and consistent with existing federal legal principles and the underlying facts of this case. This Court rejects the opinions and conclusions of Professor Leubsdorf for the following reasons: (i) his testimony reflects a lack of consideration of relevant testimonial and documentary evidence; (ii) in a number of areas the factual basis for his testimony is not supported by the record; (iii) his conclusions and recommendations are speculative and in many cases impractical; (iv) in some areas his testimony lacks credibility or is contrary to settled federal law and ethical precepts; and (v) he lacks sufficient experience in mass torts and asbestos litigation.

A. Alleged Conflict of Interest

Between Present and Future Claimants

306. The history of discussions and negotiations between various parties in this case is extremely complex, spanning a period of almost three years. Accordingly, the Court adopts the logical approach used by Professor Hazard of analyzing whether the conduct of Messrs. Rice, Cox, Kazan and Wartnick comported with the relevant ethical standards by examining that conduct in the context of five discrete time periods: (i) early 1991 until April 9, 1993; (ii) April 9, 1993 until August 9, 1993; (iii) August 9, 1993 until August 27, 1993; (iv) August 27, 1993 until October 12, 1993; and (v) October 12, 1993 until December 23, 1993.

307. Professor Hazard testified, and this Court finds, that at no time during any of these five relevant periods of settlement discussions and negotiations did Plaintiffs' Counsel have a conflict of interest between their present clients and the class of future claimants that materially limited their responsibilities to the future claimant class. Tr. at 2340. The Court notes that Professor Hazard, in rendering his opinion, relied on the rules of professional conduct as adopted in various jurisdictions (specifically, Model rules of Professional conduct 1.7(b) and 1.8), as well as the decisional law. Tr. at 2313-14. Professor Leubsdorf agreed that these were the appropriate authorities upon which to rely. Tr. at 1764, 1805.

308. In addition, the record clearly reflects that the global settlement negotiations actually contemplated a settlement of both present and future claims not only up to and following the April 9 Agreement, but until the parties' meeting with Judge Higginbotham on July 13, 1993 (at which time Judge

Higginbotham stated his view that the parties should focus on achieving a global settlement with respect to future claims only). Tr. at 1399-1400. Indeed, the April 9 Agreement by its terms contemplated a global settlement of both present and future claims. Fibreboard Exh. 908 at ¶ 2. And, even after the meeting with Judge Higginbotham, the scope of the negotiations remained in flux, with the parties in fact considering a settlement of both present and future claims (as occurred at the meetings in Dallas the week of August 9). It was not until August 22, 1993 in Philadelphia -only five days before the August 27 agreement in principle -that Plaintiffs' Counsel for quite legitimate reasons rejected a combined global settlement of present and future claims, and absolutely stated that they would only do a global deal with respect to future claims. Tr. at 325, 1426-27. Findings of Fact ¶ 170. At that late date, this Court finds that it would have been unreasonable and contrary to the interests of the Global Health Claimant Class for Plaintiffs' Counsel to leave the field.

309. This Court finds that the record is devoid of any credible evidence that, at any time during the relevant periods of discussions and negotiations, Fibreboard or the Insurers conditioned the settlement of Plaintiffs' Counsel's present cases on an agreement from Plaintiffs' Counsel to enter into a global settlement. This Court further finds that -- as Professor Leubsdorf himself acknowledged, Tr. at 1816-17 -- the instant record is devoid of any evidence that the Global Settlement was the result of any collusive or fraudulent conduct. The Global Settlement was not the result of collusive or fraudulent conduct on the part of the parties thereto.

1. Time Period (i): Early 1991 Through April 9, 1993

310. A full description of the relevant events that transpired during the period of time beginning in early 1991 through April 9, 1993 is set forth in Findings of Fact ¶¶ 91-132.

311. Professor Hazard testified, and this Court finds based on the credible evidence, that during these early discussions none of Plaintiffs' Counsel engaged in any conduct with respect to what subsequently became know as the Global Health Claimant Class that violated any rule of ethics. Tr. at 2315-16.

312. As Professor Hazard noted, during this period of discussions concerning the possibility of an assignmentbased global settlement of present and future claims "there was . . . no identified class" -i.e., no actual client - and thus no attorney-client relationship between Plaintiffs' Counsel and what subsequently became the Global Health Claimant Class. Tr. at 2316-17. Specifically, Professor Hazard testified, and this Court finds, that there was no conflict of interest during this time period with respect to Plaintiffs' Counsel's representation of their present clients and their conduct with respect to the subsequent class of future claimants, given the lack of an attorney-client relationship between Plaintiffs' Counsel and the as yet unidentified future claimant class. Tr. at 2317. Moreover, this Court agrees with Professor Hazard in finding that the record contains no credible evidence that during this period any of Plaintiffs' Counsel "did anything that was in any way adverse or constrained as far as the interests" of the

subsequent future class members were concerned, or were in any way impaired with respect to their representation of the incipient future class by their "continuing responsibilities to . . . what are now called the presents." Tr. at 2317.

2. Time Period (ii):
April 9, 1993 Through August 9, 1993

313. A full description of the relevant events that transpired during the period of time from April 9, 1993 through August 9, 1993 is set forth in Findings of Fact ¶¶ 133-153.

314. The credible evidence in the record demonstrates that -with respect to the period of time from April 9, 1993, when Continental and Fibreboard executed the April 9 Agreement, until August 9, 19[illegible] the date on which this Court appointed Plaintiffs' Counsel as negotiating counsel --Plaintiffs' Counsel's conduct toward the potential future claimants was, as phrased by Professor Hazard, "in conformity with ethical requirements." Tr. at 2318. In reaching this finding, this Court accepts Professor Hazard's conclusion that, although Plaintiffs' Counsel had not yet established an attorney-client relationship with the future claimants during this time period, they had nevertheless assumed a fiduciary responsibility toward them because Judge Higginbotham, acting as Settlement Facilitator, had, on July 13, 1993, focused the settlement discussions in such a way that a sharper definition of a possible class of future claimants had begun to emerge. Tr. at 2319-20; Findings of Fact ¶ 147.

315. This Court further finds that even assuming Plaintiffs' Counsel had an attorney-client relationship with the incipient future class during this time, their conduct still conformed to the standards of professional ethics. As Professor Hazard noted, it would have been entirely proper for a plaintiffs' lawyer to represent more than one client against a defendant without such representation creating a conflict of interest. Tr. at 2320-21. The credible evidence further reflects, and this Court thus finds, that during this period of time there was no competition between present and future claimants for insurance funds. Tr. at 1557-58. Specifically, the record does not support the assumption underlying Professor Leubsdorf's opinion that a conflict existed -- that claimants were competitors in a zero sum game -- and that as a result Plaintiffs' Counsel were forced to favor the interests of one group over the other. No party to these negotiations testified, and no document supports the assertion that Plaintiffs' Counsel viewed the present and future claimants as other than multiple clients for whom Plaintiffs' Counsel exercised zealous representation. Indeed, the evidence is to the contrary. Tr. at 1557-58.

316. The Court agrees with Professor Hazard that the possibility of a no-coverage decision in the Coverage Case appeal presented a significant risk to the present and future claimants alike. Tr. at 792-93, 1056-57, 2321-23. The Court also finds that present and future claimants were facing a further risk of impairment due to the litigation between Continental and Fibreboard with respect to the validity of certain assignments of insurance policy benefits. Tr. at 1162-65, 1514-17, 2323-24. These uncertainties -- which gave present and future claimants alike a substantial interest in a global resolution

of the Coverage Case -- were properly taken into account by Plaintiffs' Counsel. Tr. at 2321-24.

317. This Court's decision on August 9, 1993 to follow the recommendation of Judge Higginbotham[33] and appoint Messrs. Rice, Cox, Kazan and Wartnick to negotiate the prospect of a Rule 23(b)(1)(B) settlement class composed of future claimants was based on the reputation, skill, knowledge, past and present representation of asbestos claimants, and extensive experience of these four attorneys in asbestos litigation. Findings of Fact ¶¶ 293-296. Furthermore, the context in which this Court appointed Plaintiffs' Counsel was framed by the Court's knowledge and understanding of the impending risk of the Coverage Case appeal, Findings of Fact ¶¶ 36-47; the existence and terms of the Substitute Ness Motley Agreement, Findings of Fact ¶¶ 151-153; and the history of the relationships among the parties, Findings of Fact ¶¶ 89-158. In light of the requirements of Rule 23 as well as the added significance of these aforementioned factors, it was crucial for this Court to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal.

318. This Court fully credits Professor Hazard's testimony that it was essential for this Court on August 9, 1993 to appoint attorneys who had experience, knowledge and "established competence and standing" in

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[33]Letter of Judge Higginbotham dated August 5, 1993 (Fibreboard Exh. 586)

asbestos litigation to negotiate on behalf of the potential class of future claimants. Tr. at 2330. As Professor Hazard observed, asbestos litigation is and "extremely complex subject that takes intensive engagement to . . . understand and appreciate." Id. This Court finds that if this Court had appointed attorneys who did not have extensive background in asbestos litigation, it would have been an "invitation for bitter sort of criticism" and would have "jeopardiz[ed] any effort at serious negotiations." Tr. at 2330-31; Class Plaintiffs Exh. 1014 at 89-90; Class Plaintiffs Exh. 1023 at 14-15. In addition, this Court finds that the appointment of counsel inexperienced in asbestos litigation would have resulted in a less favorable settlement for the Global Health Claimant Class than the settlement that was in fact reached. Tr. 411-13, 1474-77.

319. Having fully considered all the evidence, this Court rejects Professor Leubsdorf's view that the following "practical alternatives" existed for the elimination or avoidance of what he viewed as conflicts of interest: (i) in 1991, Plaintiffs' Counsel (or some other set of plaintiffs' attorneys) could have settled their present cases with Fibreboard for cash, and agreed not to represent any additional present claimants until a global settlement agreement was executed, Tr. at 1918-19; or (ii) in August 1993, this Court could have appointed attorneys without asbestos experience because it is "quite possible that lawyers who had never actually litigated an asbestos case in the courtroom would nevertheless have a great deal of knowledge that would be relevant and very helpful in . . . settling this case." Tr. at 1770-72.

320. The Court rejects this testimony, as the evidentiary record does not support a conclusion that these were

practical or even realistic alternatives. First, since at least 1991 Fibreboard had not settled any of its asbestos-related personal injury cases on an all-cash basis, but had instead entered into a number of assignment settlements that contained "back-end" provisions. Findings of Fact ¶¶ 75-88; Tr. at 191-92. Selecting certain counsel to negotiate a global settlement by paying those counsel entirely in cash to settle their present cases would, at the very least, create an appearance of impropriety and a wellspring of opposition from other claimants' counsel whose clients had not been as favorably treated. In addition, had Fibreboard insisted that Plaintiffs' Counsel settle their present cases and agree not to represent additional present claimants, such an agreement would have constituted a violation of ethical rules. See Model Rule of Professional Conduct 5.6(b).

321. Moreover, given the fact that most, if not all, of the assignment settlements made by Fibreboard since 1991 had a "most favored nations" clause in them, see, e.g., Continental Exh. 14, an all-cash settlement by Fibreboard with any individual claimant would likely have triggered that clause in the assignment settlement agreements, thereby requiring Fibreboard immediately to pay those settlements in cash. The dollar amount of those settlements far exceeded Fibreboard's net worth, and it would have been impossible for Fibreboard to have made such payments. Tr. at 168-69, 231; Continental Exh. 14; Fibreboard Exhs. 700-709. Accordingly, Fibreboard could not as a practical matter negotiate a global settlement with supposedly "conflict-free" lawyers who had settled their present cases on an all-cash basis.

322. Second, Professor Leubsdorf himself acknowledged, and this Court finds, that the appointment of any

attorneys other than Plaintiffs' Counsel on August 9, 1993 would have created delay in the settlement process, as less experienced lawyers would have been unlikely to have negotiated a global settlement within the eighteen days between August 9 and August 27, 1993. Tr. at 1853. Moreover, as this Court has already found, it was not definitively decided that the global settlement being negotiated would consist solely of future claims until August 22, 1993. Findings of Fact ¶ 170.

323. Based on a review of the entire record, this Court finds that the appointment of less competent or less experienced attorneys would have subjected the Global Health Claimant Class to a substantial and potentially devastating risk that no settlement could be reached before an appellate decision was rendered in the Coverage Case, which could have occurred as early as August 27, 1993. The Court finds further that had negotiation by other, less experienced, attorneys resulted in a global settlement by August 27, in light of the circumstances of the case and the particular positions of the parties, such settlement would have been substantially less advantageous for the future claimant class. Tr. at 411-13, 1474-77, 2787.

324. Accordingly, this Court finds that there were no practical alternatives available with respect to the appointment of class counsel under the specific circumstances of this case. This Court further finds that this Court's appointment of Plaintiffs' Counsel as negotiating counsel on August 9, 1993, did not materially change or augment the fiduciary duties already owed to the future claimants by plaintiffs' counsel. Tr. at 2333.

3. Time Period (iii) August 9, 1993 Through August 27, 1993

325. A full description of the relevant events that transpired during the period of time from August 9, 1993 through August 27, 1993 is set forth in Findings of Fact ¶¶ 154-181.

326. This Court agrees with Professor Hazard's conclusion, and finds, that during the period of time from August 9, 1993 through August 27, 1993, Plaintiffs' Counsel did a highly effective job of negotiating on behalf of the incipient futures claimant class under the attendant circumstances. Tr. at 2336. The record is replete with evidence supporting this finding. Tr. at 1464-81; Findings of Fact ¶¶ 159-181. To the very end of the negotiating process, Plaintiffs' Counsel sought -and eventually obtained -substantial additional benefits for the Global Health Claimant Class, including an additional $35 million in compensation in the final hours of the negotiations. Findings of Fact ¶¶ 174.

327. Although Professor Leubsdorf stated his view that the trigger provisions for the contingent back-end payments in the Substitute Ness Motley Agreement gave rise to conflict of interest between the ness Motley settled claimants and the future claimants, Tr. at 1760-62, this Court instead credits Professor Hazard's convincing testimony that the Substitute Ness Motley Agreement -- including the back-end contingent payment feature of that agreement -- did not create an impermissible conflict of interest. Tr. at 2324-29. This Court finds that the interests of the future claimant class

members were synergistic and compatible with those of the present claimants whose claims were settled under the Substitute Ness Motley Agreement, given that any class settlement --which would act as a trigger for the Ness Motley back-end payments -would require court approval. Such an approval process requires a court to evaluate the fairness and reasonableness of the settlement, as well as the adequacy of the representation. Had Plaintiffs' Counsel attempted somehow to benefit their present clients by failing to negotiate zealously and diligently on behalf of the future class -thus failing to provide the class with adequate representation -they would have precluded judicial approval of the Global Settlement, thereby jeopardizing the possibility that the back-end payments would be triggered. Tr. at 2326-29. Moreover, at the time the Substitute Ness Motley Agreement was reached on August 5, 1993, the potential of a combined global settlement of both present and future claims continued to exist. Findings of Fact ¶¶ 151-170.

328. This Court finds that it was in the common interest of both the present Ness Motley claimants and the future class members that Plaintiffs' Counsel diligently and loyally negotiate the best possible global settlement on behalf of the future class, as it was in the interest of both groups to achieve a global settlement for the future class that would receive court approval. This Court finds further that it was in the common interest of both groups that a global settlement be reached prior August 27, 1993, due to the risk presented by the Coverage Case appeal. Findings of Fact ¶¶ 36-57. This common interest required Plaintiffs' Counsel to balance their efforts at negotiating for the last possible dollar that could be obtained for the future class, against the possibility that a global

settlement would not be reached and the Coverage Case appeal eventually decided in favor of the Insurers.

329. This Court finds that Plaintiffs' Counsel effectively used the threat posed to Continental by the Fibreboard v. Continental litigation in this Court, which sought to implement the Initial Ness Motley Agreement (and which itself provided for settlement values substantially higher than had historically been the case), to conclude the Substitute Ness Motley Agreement at settlement values that were higher than historical values. Plaintiffs' Counsel then used the higher-than-average Substitute Ness Motley Agreement values to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients. Tr. at 1538-40. Accordingly, this Court finds that settlement of the Ness Motley cases, occurring when and as it did, ultimately benefited the members of the Global Health Claimant Class.

330. This Court rejects any implication as factually unfounded that the Substitute Ness Motley Agreement was somehow part of a "tying arrangement" by which Messrs. Rice and Cox were "paid off" with an excessively rich settlement of their firm's cases at the expense of the future claimants. The credible evidence makes clear, and this Court finds, that (i) the Settling Parties jointly determined to settle the Ness Motley cases before focusing on a global settlement; (ii) Continental itself had independently reached the conclusion that a Ness Motley settlement was a necessary precondition to a global deal because of the litigation facing it seeking a Final 5.2 Order and the need to bring Pacific to the bargaining table,

Findings of Fact ¶¶ 149-150; and (iii) Judge Higginbotham indicated that in his view a global settlement should consist solely of future claimants. Findings of Fact ¶ 147.

331. This Court also finds, based on the extensive record established at the fairness hearing, that in reaching the Global Settlement agreement in principle announced in this Court on August 27, 1993, Plaintiffs' Counsel obtained the best possible settlement for the future class available at that time. The Court further finds that Plaintiffs' Counsel reasonably believed that the average claims values upon which they priced the Global Settlement were roughly equivalent to the average claims values inherent in the Substitute Ness Motley Agreement once the latter are discounted both for delay and risk of nonpayment. Tr. at 1155-58.

332. Mr. Robert Sweeney testified that he (i) did not take part in the global settlement negotiations in August; and (ii) moved this Court in September to be relieved of his position as negotiating counsel, due to his personal belief that he had a conflict of interest arising out of his representation of present clients and his duty toward the future claimant class. Tr. at 2434, 2437, 2452-53, 2464-66. However, on December 27, 1993, Mr. Sweeney wrote to this Court asking to be appointed as counsel to the Global Health Claimant Class. Tr. at 2446, 2466-70; Continental Exh. 55. Mr. Sweeney made this request despite the fact that he had not yet signed a settlement agreement with Fibreboard for his present cases. Tr. at 2437-38. This Court declined Mr. Sweeney's request, because the Global Settlement Agreement had already been negotiated to completion and executed on December 23, 1993. Mr. Sweeney has not objected to this settlement. Tr. 2442-43.

333. Mr. Sweeney is not an expert in the field of legal ethics and professional responsibility, nor did he assert at the fairness hearing that Plaintiffs' Counsel had violated any ethical precepts. To the contrary, he expressly declined to offer such a view. Tr. at 2431, 2479-80. Moreover, this Court does not find Mr. Sweeney's testimony to be persuasive even with respect to the issue of whether he believed that he faced a conflict of interest in negotiating a future claimant global settlement. For one thing, although Mr. Sweeney testified that he felt he could not act as negotiating counsel because he had not settled his present cases, he attended the negotiating sessions in both Philadelphia and Tyler during the week of August 23, 1993, apparently without ever voicing to the participants that he deemed himself to be operating under any such constraint. Tr. at 2687. Moreover, his testimony as to whether he advised this Court of any such reservation when he concededly accepted this Court's designation to serve was self-contradictory. Tr. at 2460-64. In any event, whatever Mr. Sweeney's views were with respect to the conflict issue, this Court finds there is no basis in the record to conclude that Plaintiffs' Counsel were in fact required to withdraw as counsel under the relevant ethical rules.

4. **Time Period (iv):**
August 27, 1993 Through October 12, 1993

334. A full description of the relevant events that transpired during the period of time from August 27, 1993 through October 12, 1993 is set forth in Findings of Fact ¶¶ 182-186.

335. This Court finds that, during the period of time between August 27, 1993, when the Global Settlement agreement in principle was announced in open court, and October 12, 1993, the day on which the Trilateral Settlement Agreement was executed, Plaintiffs' Counsel conducted themselves in accordance with the relevant ethical principles and did not violate any rules of professional responsibility. Tr. at 2339. During this period of time, Plaintiffs' Counsel did not engage in any negotiations of the terms of the Global Settlement Agreement. Findings of Fact ¶¶ 181-187.

336. In its original Order designating Professor Green as Attorney Ad Litem, this Court expressly recognized that the role of Plaintiffs' Counsel in representing asbestos claimants other than those who are members of the Global Health Claimant Class could give rise to assertions of conflicts in connection with their representation of the class members. Pacific Exh. 2. This Court undertook to appoint Professor Green based, in part, upon this Court's determination that it was not feasible to require Plaintiffs' Counsel to have fully settled all of their present cases. Pacific Exh. 2. Professor Hazard testified that the appointment of Professor Green was a "very prudent, appropriate measure of additional scrutiny and concern for the interests of the claimants," Tr. at 2350, and Professor Leubsdorf acknowledged that this appointment provided additional protection to the Global Health Claimant Class. Tr. at 1879-80.

5. Time Period (v): October 12, 1993 Through December 23, 1993

337. A full description of the relevant events that transpired during the period of time from October 12, 1993 through December 23, 1993 is set forth in Findings of Fact ¶¶ 186-189.

338. With the execution of the Trilateral Settlement Agreement on October 12, 1993, Fibreboard and the Insurers had concluded a separate agreement that, if it received court approval, would trigger the back-end payments for Plaintiffs' Counsel's present clients whether or not a global settlement was ever finally documented and judicially approved. It was from this date until December 23, 1993, the date on which the Global Settlement Agreement was executed, that Plaintiffs' Counsel, Fibreboard and the Insurers negotiated the specific terms of what became the written Global Settlement Agreement, the Trust Agreement and the TDP. This Court agrees with Professor Hazard's conclusion that, during this period of time, Plaintiffs' Counsel's conduct did not result in a conflict of interest on their part, or otherwise violate any applicable ethical standards or rules. On the contrary, the credible evidence reflects that during this period of negotiations Plaintiffs' Counsel preformed in a "very professional way." Tr. at 2341-42.

6. Conflict of Interest: Concluding Findings

339. This Court finds that there was no material limitation on the representation of the Global Health Claimant Class by Plaintiffs' Counsel's concurrent representation of present and future claimants, and that Plaintiffs' Counsel at all times acted ethically and in accordance with their professional obligations. The Court finds further that Plaintiffs' Counsel reasonably believed in light of the circumstances, that their representation of the Global Health Claimant Class would not be adversely or materially affected by their representation of or duty to their other present and former clients. Indeed, the evidence clearly reflects, and the Court finds, that at all times negotiations among Plaintiffs' Counsel, Fibreboard and the Insurers were contentious, hard-fought and conducted in good faith at arm'slength. Findings of Fact ¶¶ 117-189. Professor Green reached the same conclusions, and noted that the negotiations were frequently marked by disagreements among the negotiating parties and among Plaintiffs' Counsel themselves. Tr. 2744.

340. A number of the discussions and negotiating sessions that led to the Global Settlement were conducted under the auspices of Judge Higginbotham, in his role as Settlement Facilitator, who kept this Court informed of the progress of negotiations throughout the Spring and Summer of 1993. Tr. at 1099-1101. Moreover, on August 26 and 27, 1993 this Court observed firsthand the contentious, arm's-length nature of the negotiations. Tr. at 1458-72. Accordingly, this Court finds that the record is devoid of any evidence that Plaintiffs' Counsel compromised the interests of the Global Health Claimant Class members so as to benefit their other clients. Tr. at 1557-59.

341. The evidence reflects that circumstances have substantially changed since August 27, 1993, such that renegotiation of the Global Settlement by a different set of attorneys at this point in time would likely result in a settlement less favorable to the Global Health Claimant Class than the Global Settlement. Findings of Fact ¶¶ 269-272.

342. This Court finds that Messrs. Rice, Cox, Kazan and Wartnick adequately, professionally, and ethically represented the interests of the Global Health Claimant Class members. This Court further finds that at all times during the relevant periods of settlement discussions and negotiations, the conduct of Plaintiffs' Counsel fully comported with the applicable standards of legal ethics and professional responsibility. This Court further finds that the record is devoid of any evidence suggesting either that Plaintiffs' Counsel failed to represent zealously and loyally the interests of the Global Health Claimant Class members or otherwise compromised the interests of that class in order to benefit any other client or group of clients.

B. Alleged Intraclass Conflicts

343. The Ortiz Intervenors assert that intraclass conflicts exist between each of the following pairings of groups of Global Health Claimant Class members: (i) class members who were first exposed to asbestos-containing products prior to March 15, 1959, and those who were first exposed after that date; (ii) class members who have already suffered a "cognizable" asbestos-related injury and those who have not yet suffered such an injury; and (iii) class members who will be individually represented in filing their claims against the

Trust by Plaintiffs' Counsel (some of whow are also members of the Select Counsel for the Beneficiaries ("SCB")), and those class members whose individual attorneys are not members of the SCB. Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 28, 1994); Tr. at 1778-87. The Ortiz Intervenors' expert, Professor Leubsdorf, acknowledged at the fairness hearing that separate subclasses consisting of these various groups are not required, but he asserted that separate counsel should have been appointed to negotiate on behalf of the various interests of Global Health Claimant Class members. Tr. at 1886-87.

344. In general, the Court finds the Professor Leubsdorf's testimony on these points lacks credibility. Professor Leubsdorf expressed the view that distinctions, often arbitrarily chosen, create conflicts that prevent ethical representation of a class even where the common interests shared by the class members vastly outweigh the distinctions among them, and the settlement fairly accommodates all interests. The Court takes judicial notice that, were this view to be correct, numerous settlements reflecting far more blatant distinctions among intraclass groups would necessarily have been the product of unethical conduct. See, e.g., Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983); Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Indeed, were Professor Leubsdorf correct, new negotiating counsel would have to have been added and dropped from the team repeatedly throughout the negotiating process as Fibreboard and the Insurers proposed and then withdrew proposals that might arguably (when viewed in hindsight) favor one subgroup over another.

345. Based on the credible evidence presented, this Court finds that there have been and continue to be no intraclass conflicts within the Global Health Claimant Class such that either subclassing or separate negotiating attorneys were or are now required. Moreover, this Court finds that the common interests of the class members far outweigh any differing interests that they may have.

346. The Court finds that the Global Health Claimant Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorney's fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

1. Alleged Conflict Between Pre-1959 and Post-1959 Claimants

347. The Ortiz Intervenors' suggestion that the distinction between pre-1959 and post-1959 claimants creates an impermissible conflict for Plaintiffs' Counsel seeks to draw upon a historical vestige of Fibreboard's insurance dispute. Although there are many reasons why claims arising from earlier

exposure to Fibreboard's products tended to be of greater value (including the fact that those claimants generally had more extensive exposure to Fibreboard asbestos and suffered from more severe disease, and the fact that Fibreboard's liability to those claimants was shared among fewer solvent defendants, Findings of Fact ¶ 26), the pre-1959 versus post-1959 dividing line in actuality stems from the cutoff point in coverage under the Continental policy.

348. Before 1992, the lack of insurance coverage for post-1959 claims was a given, but not a disqualifying conflict. In the past, counsel representing individuals with claims against Fibreboard, including Plaintiffs' Counsel, have represented both claimants with pre-1959 claims and claimants with post-1959 claims. The Ortiz Intervenors do not maintain that this created an impermissible conflict. Leubsdorf Tr. at 1933.

349. Before the Settling Parties agreed upon how to treat pre and post-1959 claims in the Global Settlement, several events had vitiated any logic for perpetuating the preand post-1959 insurance-based distinction. First, the Pacific II Agreement had (contingent on subsequent rulings) provided for $330 million of insurance money for post-1959 claims (both existing and future). Fibreboard Exh. 905. Second, in the April 9 Agreement, Continental agreed to negotiate for a global settlement that would resolve all claims (preand post-1959), and also agreed to pay the amounts due under the Pacific II Agreement were a global settlement to be reached. Tr. at 311-12; Fibreboard Exh. 908. Third, consistent with the April 9 Agreement, on August 27, 1993 the parties agreed upon a settlement that Plaintiffs' Counsel believed to be sufficient to

pay fair value to claims irrespective of the date of exposure. Tr. at 1043-47. Fourth, on October 12, 1993, the Insurers and Fibreboard entered into the Trilateral Settlement that, subject to court approval, makes money available to Fibreboard irrespective of the date of exposure. Fibreboard Exh. 910. Finally, the decision as to how to divide the settlement among class members did not take place until the negotiation of the TDP, which occurred after October 12. Tr. at 1953.

350. Accordingly and reasonably, Plaintiffs' Counsel negotiated the Global Settlement so that future asbestos-related personal injury claimants would be compensated irrespective of whether their claims arose from pre- or post-1959 first exposure to asbestos. Tr. at 653.

351. The Court rejects Professor Leubsdorf's testimony as to the existence of an impermissible conflict of interest between pre-1959 and post-1959 claimants because: (i) he lacks experience in mass tort cases and asbestos litigation; (ii) as described in these Findings of Fact, the credible evidence in the record does not support his factual predicate; (iii) his conclusion is entirely speculative and without foundation; (iv) his interpretation of the ethical rules would lead to highly impractical results that would provide no benefit to Global Health Claimant Class members, and would instead force them unnecessarily to face substantial risks; and (v) his conclusion is not grounded upon, and is in fact inconsistent with, applicable law. Of particular note was Professor Leubsdorf's admission at the fairness hearing that -- in forming his opinion -- he had not read the Pacific II Agreement or the April 9 Agreement, both of which materially affect the question of whether separate

representation for pre-1959 and post-1959 claimants was required. Tr. at 1892.

352. The Settling Parties presented the expert testimony of Professor Hazard with respect to this issue. Professor Hazard testified that, in his expert opinion, which this Court credits and accepts, the concurrent representation of pre-1959 claimants and post-1959 claimants by Plaintiffs' Counsel did not present an impermissible conflict of interest. Tr. at 2342-45. Professor Hazard reasoned that before negotiations had begun, the Pacific II Agreement had rendered the interests of the pre-1959 and post-1959 claimants substantially similar, and that equality of treatment embodies a principle of fairness that would appeal to both groups. Tr. at 2344.

353. The Court accepts Professor Hazard's testimony that the concurrent representation of the pre-1959 and post1959 claimants by Plaintiffs' Counsel did not present an impermissible conflict which disabled Plaintiffs' Counsel, and finds his reasoning persuasive. This Court finds that the Pacific II Agreement, the April 9 Agreement and the Trilateral Settlement Agreement removed the potential for differential treatment of the pre-1959 and post-1959 claimants in the context of a global settlement. Tr. at 2342-45; Fibreboard Exhs. 905, 908, 910.

354. Based upon the testimony of Professor Hazard and the other credible evidence presented, this Court finds that Plaintiffs' Counsel were not ethically conflicted, and indeed acted vigorously, diligently, professionally and ethically in representing both pre-1959 and pre-1959 claimants.

2. Alleged Conflict Based

on "Cognizability" of Injury

355. The Global Settlement Agreement provides, inter alia, that claimants will not be entitled to any payment from the Trust on account of claims for punitive damages, damages in excess of Fibreboard's actual share of responsibility, damages for increased risk of cancer, pre-judgment interest or post-judgment interest, and that total payments arising from one individual's exposure to asbestos shall not exceed $500,000. The Global Settlement Agreement also contains certain spendthrift provisions. Findings of Fact ¶¶ 200-202.

356. Class Counsel believed that the abovedescribed provisions would benefit the Global Health Claimant Class as a whole, because class members who do not suffer compensable injury until well into the future have an interest in provisions that increase the likelihood that funds will be available to pay their claims. Tr. at 914-15. Based on the record before it, the Court finds that this belief was well founded.

357. The Ortiz Intervenors argue that Plaintiffs' Counsel's concurrent representation of all future claimants created an impermissible conflict of interest on their part, where -according to the Ortiz Intervenors' expert -some of them have already suffered "legally cognizable" injury and some of them have not. Tr. at 1784. The Ortiz Intervenors offered Professor Leubsdorf as an expert witness on this issue.

358. As an initial matter, the Court observes that it has already found that all members of the Global Health Claimant Class have "legally cognizable" injuries in the sense that they all satisfy the requirements for subject matter jurisdiction. Findings of Fact ¶¶ 1-5. Accordingly, to the extent the Ortiz Intervenors intend in their objection to use "legally cognizable" in this sense, their objection is found to be meritless as it is based on a factual premise -that there are some class members without "legally cognizable" injuries -that this Court has already rejected. Hereafter the Court will address the Ortiz Intervenors' argument on this point on the assumption that by a "legally cognizable" injury what is in fact meant is a presently manifested asbestosrelated injury, such that a person with such an injury is -in the words of Professor Leubsdorf -"going to present their claims within a rather short time." Tr. at 1785.

359. Professor Leubsdorf testified that, in his opinion, the concurrent representation of these groups was inappropriate because, according to him, Global Health Claimant Class members who have already suffered a "legally cognizable" injury have an interest in securing recovery free of limits such as are imposed by the Global Settlement. At the same time, according to Professor Leubsdorf, Global Health Claimant Class members who have not already suffered "legally cognizable" injury have a conflicting interest in seeking such limits, in the hope of preserving funds available to pay their claims. Tr. at 1784-86.

360. The Settling Parties presented the expert testimony of Professor Hazard with respect to this issue. Professor Hazard testified that, in his expert opinion, Plaintiffs' Counsel's concurrent representation of future claimants who

had already suffered "legally cognizable" injury and those who had not did not present an impermissible conflict of interest. Professor Hazard reasoned the issue does not present a question of ethics or a conflict of interest. Tr. at 2348-49.

361. The Court accepts Professor Hazard's testimony that Plaintiffs' Counsel's concurrent representation of future claimants who had already suffered "legally cognizable" injury and those who had not did not present an impermissible conflict of interest that disabled Plaintiffs' Counsel. The Court finds the credible evidence reflects that (i) during the process of negotiations there was no competition for insurance funds between these two groups of claimants; (ii) all Global Health Claimant Class members had an equal interest in settling their claims and avoiding the risk of the Coverage Case appeal; and (iii) any demarcation between groups of class members based on the time an injury becomes "cognizable" or manifested is purely arbitrary. Tr. at 1888-89, 1923-25. Furthermore, this Court finds that the interest of the two subgroups at issue here coincide to a far greater extent than they diverge. For example, both subgroups equally share the risk of a loss of the Coverage Case that might result were no settlement to be reached, equally share the desire for a fair and equitable settlement, and equally share the interest in preserving funding for all class members.

362. Based on the credible evidence, this Court rejects Professor Leubsdorf's conclusion as to the existence of an impermissible conflict of interest between these groups of class members because: (i) he lacks practical experience in mass tort cases and asbestos litigation; (ii) his application of ethical rules leads to highly impractical results that provide no benefit to Settlement Class Members and instead

create substantial risks to Settlement Class Members; and (iii) his conclusion is not grounded upon and is in fact inconsistent with applicable law.

363. Based upon the testimony of Professor Hazard and the other credible evidence presented, this Court finds that Plaintiffs' Counsel did not have a conflict of interest, and indeed acted vigorously, diligently, professionally, and ethically in representing both the Global Health Claimant Class members who had already suffered a "legally cognizable" injury and those who had not.

3. Alleged Conflicts Relating to SCB

364. The Trust Agreement provides for a group of attorneys to serve as Select Counsel for the Beneficiaries ("SCB"). The duty of the SCB members is to represent the interests of the Global Health Claimant Class members consistent with the purposes of the Trust. As the Trust Agreement was originally written, Plaintiffs' Counsel (together with several other attorneys) were to serve as the initial SCB. The SCB duties specifically include giving prior approval (by a majority vote) on a variety of Trust matters, including amendment or waiver by the Trustees of certain provisions of the Trust Agreement or TDP, and the filling of vacancies in the Class A and Class B Trustee positions.

365. The Ortiz Intervenors argued that service on the SCB by asbestos lawyers representing claimants against the Trust presents an impermissible conflict of interest. They offered Professor Leubsdorf as an expert witness on this issue. Professor Leubsdorf testified that, in his opinion, there exists the

possibility that Global Health Claimant Class members individually represented by an SCB member might receive better treatment from the Trust than those class members who are not represented by SCB members, either because low-level employees of the trustees might give preferential treatment to class members represented by SCB members out of concern for their jobs, or because trustees of the Trust might "wink at" preferential treatment of the clients of the SCB members if they believed that unless they permitted such preferential treatment, the SCB members would not approve certain decisions that were necessary to accomplish the purposes of the Trust. Tr. at 1782-84.

366. Professor Hazard testified that the risk that SCB members will use their status as such to seek an unfair advantage for their individual clients at the expense of the other members of the Global Health Claimant Class is insignificant for the following reasons: (i) it is to be assumed that the trustees will honor their fiduciary responsibilities to the class; (ii) the continuing scrutiny of the claims handling process will deter misconduct; (iii) SCB members have little to gain and much to lose by engaging in illegal or improper conduct, and thus it is not in their interest to engage in any misconduct that would cast doubt on the legitimacy of either their role as SCB members or as attorneys for individual claimants; and (iv) this Court has continuing jurisdiction over this action, and will be receiving an annual accounting of Trust-related activities that will be publicly available such that persons who believe the trustees are acting in any way contrary to the interests of the beneficiaries may bring those facts to the attention of this Court. Tr. at 2346-47.

367. This Court in a Memorandum to the Parties of March 30, 1995 expressed the view that the Global Health Claimant Class would be better served by an SCB that avoided even the appearance of impropriety, although the negotiations of the SCB provision did not undermine Plaintiffs' Counsel's ability to represent the Class fairly and adequately, and Plaintiffs' Counsel did not advocate those provisions during negotiations based on self-interest or other inappropriate motive. The Court expressed reservations, consistent with concerns of the Guardian Ad Litem, about provisions of the original Trust Agreement that required unanimous concurrence of all other SCB members to remove a member, that permitted SCB members to serve until they die, resign, or are removed, that gave SCB members the power to select their replacements, and that allowed SCB members both to represent claimants before the Trust and to seek removal of trustees and select replacement trustees. The Court advised that it had decided to withhold approval at that time, invited the settling parties to consider amending the SCB provisions, and suggested procedures for the Settling Parties to consider.

368. The Settling Parties entered into a "Third Amendment to Global Settlement Agreement" ("Third Amendment") as of May 15, 1995. The Third Amendment changed the SCB provisions to address the Court's concerns. One, the composition, terms of service, removal, and replacement provisions have been changed. As amended, the SCB consists of five lawyers. The Class A member will be a representative of organized labor. The Class B and C members will be individuals who do not represent individual plaintiffs in asbestos personal injury litigation. The Class D and E members will be lawyers with experience representing plaintiffs with

experience representing plaintiffs in asbestos personal injury litigation, including those with Interim Claims before the Trust. Initial terms are two years for the Class A member, four years for the Class B and C members, and five years for the Class D and E members. Thereafter, each SCB member serves a five-year term. Any SCB member may be removed by the Court on application of any other member, any trustee or any trustor. Vacancies in the Class A position will be filled by the AFL/CIO. Vacancies in the Class B, C, D and E positions will be filled by votes of law firms that have liquidated claims with the trust during the preceding two fiscal years, with one vote per $100,000 in aggregate liquidated amount of claims. The Class D and E members will come respectively from the western and eastern halves of the United States and will be elected, separately, by law firms with their principle places of business in the area from which they come. Two, only Class D and E members may represent beneficiaries before the Trust, and only Class A, B and C members may vote on removal or appointment of trustees.

369. The provisions adopted by the Third Amendment regarding SCB members satisfy the Court's concerns. The Guardian Ad Litem has advised that the provisions are a wise and appropriate response to the concerns that he and the Court raised, and that he supports the Third Amendment and recommends approval of the Global Settlement, as amended. These provisions were the subject of notice, and a hearing was held on June 20, 1995. No intervenor objected to them, and the Court received no other objection of substance. The Court finds that the SCB provisions, as amended, avoid even the appearance of impropriety, and remove the possibilities that some future SCB member may use

his or her powers to gain an unwarranted advantage for claimants whom he or she represents, or that such undue influence may impugn the reputation or integrity of the Trust.

C. This Court's Consent

370. Even if this Court were to find -- which it does not -- that Plaintiffs' Counsel's representation of the Global Health Claimant Class was such that it may have been materially limited by their other responsibilities, this Court finds that the representation was ethical because (i) Plaintiffs' Counsel reasonably believed that the representation was not adversely affected; (ii) the members of the Global Health Claimant Class would undoubtedly have consented to the representation had it been possible to consult them; and (iii) this Court's careful scrutiny of the settlement and the process by which it was negotiated, is, as Professor Hazard testified, an effective substitute for that consent in the context of a class action settlement. Tr. at 1024-25, 1192-93, 2340-41. The Court would therefore consent on behalf of the Global Health Claimant Class to the representation of the Class by Class Counsel, subject to amendment of the SCB provision of the Trust Agreement as discussed above. See Findings of Fact ¶¶ 364-369.

371. Indeed, given the eminent fairness of the Global Settlement, and in view of the specific factors set forth below, this Court finds that it would be wrong to label Plaintiffs' Counsel's zealous representation as unethical, or to deprive the class members of the substantial benefits of the settlement, solely because the members of the class were so numerous that

it was impossible to obtain informed consent to the representation from each individual class member.

372. In making this finding the Court relies on the following further findings:

> --There is no credible evidence in the record that the alleged material limitation on the representation resulted in any prejudice to the Global Health Claimant Class or otherwise materially impaired Plaintiffs' Counsel's representation of the class. The Ortiz Intervenors' entire presentation to the Court consists of unsubstantiated speculation that other, ostensibly unconflicted counsel "might" have gotten a better deal and that this Court's fairness review cannot eliminate that possibility. Tr. at 1777-78, 1837, 1856-57, 1868, 1901. Indeed, Professor Leubsdorf conceded that he was unaware of any actual prejudice that the members of the Global Health Claimant Class had suffered as a result of the alleged conflicts. Tr. at 1901.
>
> --Plaintiffs' Counsel acted vigorously and diligently in representing the Global Health Claimant Class and believed that they were acting in the best interests of the Global Health Claimant Class as a whole. Findings of Fact ¶¶ 296, 315, 326, 328, 331, 342, 354, 363.
>
> --Plaintiffs' Counsel's representation of present claimants against Fibreboard redounded to the advantage, rather than the disadvantage, of the Global Health Claimant Class. Findings of Fact ¶ 329.

--There is no credible evidence of the existence of other "conflict-free" counsel who were qualified to negotiate a fair, reasonable and adequate global settlement. Findings of Fact ¶¶ 317-324.

--Had there been as many separate attorneys representing the Global Health Claimant Class as Professor Leubsdorf opined that there should have been, there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal. Tr. at 1558-59, 1917, 2345.

--There is no evidence that Global Health Claimant Class members would have benefited in any way from representation by allegedly "conflict-free" counsel.

--The overwhelming majority of the members of the Global Health Claimant Class, including the class representatives, have not objected to the alleged conflicts of interest. Findings of Fact ¶ 203.

--The Guardian Ad Litem has independently scrutinized the settlement negotiations and is satisfied that Plaintiffs' Counsel "exhausted every possible benefit they could get for the Class" and that the settlement is a "very good deal." Tr. at 2786-88.

--The Global Settlement is more favorable to the Global Health Claimant Class than the Trilateral Settlement. Findings of Fact ¶¶ 231-243.

--Because of changed circumstances, there is a substantial risk that a renegotiation of the Global Settlement today would result in a settlement less favorable to the Global Health Claimant Class than the Global Settlement that was in fact concluded. Findings of Fact ¶¶ 269-272.

--The Global Settlement is fair, reasonable and adequate from the standpoint of members of the Global Health Claimant Class. Findings of Fact ¶¶ 191-204.

D. Fees

373. In mid-June 1993, Messrs. Rice and Cox met with Messrs. Wachtell and Koplow in Washington, D.C. At that meeting several issues were discussed in connection with the costs of administering a global settlement were one to be reached including the question of legal fees for Plaintiffs' Counsel. Mr. Wachtell raised the subject of legal fees in the context of his firm's experience in securities fraud cases, making clear that Continental would not be prepared to pay a fee to class counsel in a Fibreboard class action settlement that would approach the 25% fees sometimes awarded class counsel in securities fraud class actions. Mr. Wachtell stated that he would recommend to Continental that it agree to pay Plaintiffs' Counsel's fees up to a capped amount of 3% of the settlement amount, were such fees to be awarded by the Court and affirmed upon any appeal. The issue of Plaintiffs' Counsel's fees had not been discussed with Continental at this point, and Mr. Koplow made it clear to Messrs. Rice and Cox that even the 3% figure would have to be discussed with and agreed to by Continental. Mr. Rice made it clear that any fee, whatever the

amount, would have to be paid separately from, and not out of the proceeds of, the settlement fund. Tr. at 111012, 1387-93, 1590-91.

374. Plaintiffs' Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not assume that any particular fee would be awarded to them by this Court. Tr. at 672, 1592.

375. Further discussions between the Insurers and Plaintiffs' Counsel regarding Plaintiffs' Counsel's fees did not occur again until August 1993. Tr. at 1591. On August 27, 1993 -- when the Global Settlement agreement in principle was announced in open court -- the Settling parties set forth their agreement that (i) should this Court award Plaintiffs' Counsel fees, those fees would be paid by the Insurers as an additional obligation separate from their obligation to fund the Global Settlement itself, and would not be paid out of the Global Settlement fund; and (ii) the Insurers' obligation to pay such fees would be capped at 3% of the settlement amount. Fibreboard Exh. 592.

376. This Court finds that there is no credible evidence that Plaintiffs' Counsel were promised, or could assume that they would receive, any particular amount of attorneys' fees in connection with their service as counsel to the Global Health Claimant Class. In addition, the Court finds that there is no credible evidence that the amount of the attorneys' fees Plaintiffs' Counsel might receive in connection with this action had any negative effect whatsoever on their effectiveness as vigorous advocates for the interests of the Global Health Claimant Class.

XIII. GUARDIAN AD LITEM

377. Plaintiffs' Counsel have been heavily involved in representing asbestos-related personal injury claimants, including claimants who are not members of the Global Health Claimant Class, over the last ten to twenty years. See Findings of Fact ¶ 293. Because this fact could give rise to assertions of conflicts of interest in connection with Plaintiffs' Counsel's representation of the Global Health Claimant Class, on October 12, 1993, this Court appointed Professor Eric D. Green, of the Boston University School of Law, to serve as Attorney Ad Litem on behalf of the Global Health Claimant Class. Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993).[34]

378. Professor Green is fully knowledgeable in asbestos mass tort matters, and has served as Special Master in many such litigations,[35] but has not represented asbestos

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[34]Subsequently, by Order dated March 15, 1994, this Court changed Professor Green's designation to "Guardian Ad Litem" and provided him with judicial immunity from suits related to his activity in this lawsuit. Order Appointing Guardian Ad Litem, Dkt. No. 117 (March 15, 1994).

[35]Professor Green has served in the following capacities: Special Master, N.D. Ohio, Ohio Asbestos Litigation; Special Master, D. Mass., Massachusetts Asbestos Litigation; Special Master, D. Conn., Connecticut Asbestos Litigation; Special Master, Massachusetts Superior Court, State Asbestos Litigation; Advisor to the Trustees of the Manville Personal Injury Settlement Trust. Tr. at 2715-17; Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993). In addition, Professor Green was asked by the Administrative Office of the United States Courts to perform a study of methods of handling asbestos litigation, and he completed that study in the mid-1980s.

(continued...)

claimants. He has taught at Boston University School of Law for seventeen years, where his principal areas of academic involvement have been dispute resolution and evidence. He has also taught constitutional law, legal ethics and legal process. In addition, Professor Green ha been a mediator since 1977, conducting mediations and facilitating settlements in thousands of cases, including personal injury, toxic tort and environmental cases. As part of that practice, Professor Green teaches and writes about the negotiating process. He has also participated with members of the judiciary and the bar at numerous conferences concerning litigation, settlement and alternative dispute resolution generally, and asbestos litigation in particular. Report of the Guardian Ad Litem ("Guardian's Report) at 2-4; Tr. at 2717-18.

379. As stated in this Court's Order appointing Professor Green, "the Court is of the view that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the [Global Health Claimant] Class and thereby to afford the Class additional assurance that their interests will be adequately protected." Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993). In addition, this Court directed Professor Green "to render a report to the Court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of members of the provisionally certified Class and advise the Court from the point

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(...continued)
Tr. at 2715-17.

of view of Class members as to such further aspects of this proceeding as the Guardian Ad Litem deems appropriate or as the Court may request." Order Appointing Guardian Ad Litem, Dkt. No. 117 (March 15, 1994). Professor Green was identified in the Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing sent to class members, and a post office box address was set forth therein so that class members could send any comments they might have directly to Professor Green. Continental Exh. 28.

380. In carrying out this appointment, Professor Green closely reviewed both the history of the negotiations that led to the Global Settlement, as well as the result of the negotiations as embodied in that settlement, to determine whether the settlement was the result of fraud or collusion on the part of any of the parties to the Global Settlement. Professor Green carefully considered the history and possible future of asbestos-related litigation in general, Fibreboard's involvement in asbestos-related litigation in particular, and the insurance coverage litigation between Fibreboard and the Insurers. He considered the prospects and procedures that would be faced by future asbestos claimants in the tort system, including the litigation strategies that may be adopted by the parties, the transaction costs and delays involved in the tort system, and the potential impact of bankruptcy. Professor Green compared the results to be had under the tort system with the claims evaluation and dispute resolution procedures provided under the TDP. Guardian's Report at 4-5; Tr. at 2719-21.

381. Professor Green also assessed the range of possible recovery by the members of the Global Health

Claimant Class, and in doing so considered three alternative scenarios: (i) approval of the Global Settlement; (ii) approval of the Trilateral Settlement and disapproval of the Global Settlement; and (iii) disapproval of both the Global and Trilateral Settlements, with resultant reliance on the outcome of the Coverage Case. In considering these scenarios, Professor Green also took into account: (i) the various projections of the likely number of future claims for personal injuries caused by Fibreboard asbestos, the methods of setting a range of values for those claims, and the amount of funds available to compensate those claims under the Global Settlement; (ii) the impact on the Global Health Claimant Class of provisions in the Global Settlement Agreement that restrict the rights of class members that would otherwise be available in the tort system; and (iii) the impact of the Global Settlement on various segments of the Global Health Claimant Class, including those who have already-existing claims, those whose diseases will not be diagnosed for many years, those whose first exposure to Fibreboard asbestos was before March 15, 1959, those whose first exposure was after that date, those who have contracted or will contract more serious asbestos-related diseases, and those whose diseases are or will be less severe. Guardian's Report at 5-6; Tr. at 2721-22.

382. Professor Green also considered the possibility that, were the Coverage Case appeal to go forward, such appeal could result in a decision adverse to Fibreboard (and thus adverse to the members of the Global Health Claimant Class). Professor Green also considered the financial resources that are likely to be available to compensate class members under the Global Settlement as compared to the resources available to the class under the Trilateral Settlement, including

an assessment of the gross funds generated under each settlement as well as the net funds likely to be received by class members. This involved an analysis of the transaction costs involved in each alternative settlement scenario, and the value of Fibreboard itself. Guardian's Report at 6; Tr. at 2723.

383. Professor Green also took into account the opinions of Plaintiffs' Counsel, the class representatives and other members of the Global Health Claimant Class. In doing so he (i) carefully considered the views of Plaintiffs' Counsel as expressed in their testimony and in private interviews he conducted; (ii) carefully considered the statements of the class representatives in their depositions, pleadings and private interviews; (iii) reviewed every letter sent to him by class members, considered comments made by class members in private interviews, and took into account the contents of all objections and motions to intervene filed by class members; and (iv) considered statements made on the record by counsel for the intervenors and objectors and comments provided to him in private interviews. Professor Green also considered the views of other members of the plaintiff's bar in many private interviews, and the reactions to the settlement expressed by various groups such as the AFL CIO, the White Lung Association and others. Guardian's Report at 6; Tr. at 2723-24.

384. To assist him in this undertaking, Professor Green enlisted the assistance of James Ryan (a former worker's compensation judge) and Professor Dwight Golann. Professor Green was also aided by a registered nurse/attorney with experience in the health care field, and by a research associate. To assist in his understanding of the epidemiological evidence presented in the case, Professor Green retained a

professor in epidemiology and biostatistics at the Harvard School of Public Health as an expert consultant. Professor Green also consulted with an expert in civil procedure in evaluating the impact of the settlement on joint and several liability, contribution and indemnity issues as they could affect Global Health Claimant Class members, and informally consulted with other experts regarding financial questions such as the likely return to the Trust on the Trust's assets. Guardian's Report at 7-9; Tr. at 2726, 2728.

385. Professor Green and his team personally attended or otherwise participated in almost every court conference or hearing held since his appointment, and he has reviewed the transcript of every proceeding conducted in this case before his appointment. Professor Green participated in the hearing regarding the providing of notice to the Global Health Claimant Class, reviewed all the notice documents and the notice dissemination plan, and provided comments to the Court and to the Settling Parties regarding the text of the notice and the method of its dissemination. Professor Green attended all eight days of the fairness hearing in this action, and frequently asked questions of the witnesses. Professor Green and his colleagues fully participated in all discovery, attended all depositions, frequently asked questions, and received and reviewed all documentary discovery produced by the Settling Parties (over 827 documents totaling over 17,500 pages). Professor Green has stated that he "found the settling parties to be a hundred percent cooperative with all [his] requests" for information. Tr. at 2727-28. He and his staff also received and reviewed all of the pleadings, motions, memoranda and briefs in this case. Guardian's Report at 8-13; Tr. at 2726-27.

386. Based on these efforts, as well as his experience, Professor Green set forth his views both orally at the fairness hearing and in a 92-page report to this Court. First, Professor Green stated that the members of the Global Health Claimant Class share a desire for fairness (including a belief that more seriously ill claimants should be paid first), certainty of funding, fast and simple claims processing, and protection for all class members. Of the several hundred comments received from class members, only 23 expressed any opposition to the Global Settlement, and most of those were based on misconceptions regarding the functioning of the settlement. Guardian's Report at 13-18; Tr. at 273642.

387. Second, Professor Green found no evidence of fraud or collusion, either with regard to the value of the settlement, the class definition (including the "cut-off date" element of that definition), the TDP or the valuation of cases. It was his view that no benefit to Plaintiffs' Counsel from the settlement at the expense of others had been identified or proved. Professor Green scrutinized the settlement for evidence that the interests of the Global Health Claimant Class might have been sacrificed by Plaintiffs' Counsel for their own benefit or the benefit of their other clients. He detected no evidence of this. To the contrary, Professor Green was of the view that the Global Settlement negotiations were conducted at arm's length by experienced and capable counsel, and that the negotiations were in fact frequently marked by conflict among the various parties. Guardian's Report at 20-27; Tr. at 2744, 2747.

388. Third, Professor Green expressed the view that the creation of the Trust by the Global Settlement relieves the class members of the risk of a loss by Fibreboard of

the Coverage Case appeal, the risk that Fibreboard's assignment program might be found to have vitiated the policy coverage, and the risk of a Fibreboard bankruptcy that would likely result if the Coverage Case were lost in whole or in part by Fibreboard. Professor Green determined that the use of a trust would greatly reduce the transaction costs -especially attorneys' fees -that would be incurred in the tort system, and that the net amount to be received by class members would be greater under the Global Settlement than under a corresponding settlement in the tort system. He also expressed the view that the procedures under the TDP are fair and reasonable, including the spendthrift provisions and the definition and prioritization of five disease categories, and that the TDP should enable class members to obtain compensation in a faster and more rational manner than would be provided in the tort system. In particular, Professor Green expressed the view that the claims management and dispute resolution procedures of the Trust are designed to and will promote the prompt, inexpensive and fair resolution of claims. Guardian's Report at 28-29, 35-38; Tr. at 2748-51.

389. Fourth, Professor Green stated that the Select Counsel for the Beneficiaries is a useful device for ensuring that the Trust provides fair and equitable compensation to class members. Nevertheless, he expressed the view that any attorney who prosecutes claims against the Trust should not also serve on the SCB. Professor Green noted that as Guardian Ad Litem he was not empowered to compel amendment of the Global Settlement Agreement and stated that, he would urge approval even if no such limitation on who may serve on the SCB were adopted. Guardian's Report at 89-91; Tr. at 2753-55. Subsequent to the fairness hearing, and in resoponse to the concerns expressed by Professor Green and by the Court, the

Settling parties agreed to the Third Amendment to the Trust Agreement ("Third Amendment") as set out in Findings of Fact ¶ 368. Professor Green advised the Court that the third Amendment ameliorated his major concerns regarding the appointment and powers of the SCB, and expressed the opinion that "the Amendment adopted by the Settling parties was a wise and appropriate response to those concerns." Letter to Judge Parker from Eric D. Green, dated June 12 1995.

390. Fifth, Professor Green identified several areas in which the members of the Global Health Claimant Class had given up rights in exchange for achieving the Global Settlement. In each instance, however, he concluded that it was reasonable for the class to have done so:

> --The class releases certain rights to recover against Fibreboard and the Insurers, and thus bears the risk that the settlement funds might be insufficient. However, Professor Green believes that this is reasonable in light of the amount of money provided for by the Global Settlement and the other benefits achieved thereby. Guardian's Report at 28-30; Tr. at 2755-56.
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> --The class members are not permitted to opt out of the Global Settlement; however there is a right to exit to the tort system at the back end of the process that lessens the effect of this provision. Guardian's Report at 30; Tr. at 2756.
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> --Class members are barred from recovering punitive damages, judgments in excess of $500,000 in a single case, preand post-judgment interest, and judgments that

impose joint and several liability. Professor Green found, however, that punitive damages and judgments greater than $500,000 have rarely been awarded against Fibreboard, that settlements generally do not provide for the payment of interest, and that all of these limitations on the right to recover damages -- including the right to recover under a theory of joint and several liability -- benefit the class as a whole by maximizing the likelihood that funds will be available to pay all claimants. Guardian's Report at 30-32; Tr. at 2756-59.

391. Professor Green also carefully assessed whether it is fair, under the Global Settlement, that Fibreboard not pay more money into the settlement fund. He concluded that Fibreboard had contributed substantially to the settlement by managing the developing its disputed insurance coverage into a very valuable asset, and then transferring that asset to the Global Health Claimant Class. Guardian's Report at 34; Tr. at 2760-61.

392. Professor Green further concluded that, despite the work done by Drs. Nicholson, Peterson and Vasquez, one cannot predict with any confidence the number of future claims against Fibreboard. This is due to the number of key assumptions that must be made -- such as regards propensity to sue and the incidence of nonmalignancies -- and the range in those assumptions. Accordingly, Professor Green's assessment of the fairness and reasonableness of the Global Settlement is not premised on the accuracy of any particular prediction as to the number of future claims. Guardians' Report at 38-54; Tr. at 2761-64.

393. Professor Green analyzed the benefits and risks to the class under three alternative scenarios: (i) approval of the Global Settlement; (ii) approval of the Trilateral Settlement but disapproval of the Global Settlement; and (iii) disapproval of both the Global and Trilateral Settlements (and thus reliance on the outcome of the Coverage Case). He concluded that -- with respect to the third scenario -- there is a substantial risk of reversal by the California Supreme Court of the California Court of Appeal's decision, and that, even if that risk were small, the result of such reversal would be so catastrophic for members of the Global Health Claimant Class that the risk should not be taken. Accordingly, Professor Green concluded that "it would be extremely risky and potentially devastating and tragic if both the Global and Trilateral Settlements were ultimately rejected by the courts." Tr. at 2705; see also Guardian's Report at 56-76; Tr. at 2764-65.

394. Professor Green also concluded that a number of "nonmonetary" factors weigh in favor of finding the Global Settlement superior to the Trilateral Settlement. In Professor Green's view, the Global Settlement will mitigate or eliminate any "race to the courthouse" by plaintiffs' lawyers that might occur under the Trilateral Settlement, the result of which would be inequitable distribution of settlement funds to claimants. Professor Green also stated that Global Settlement will eliminate the "lottery effects" often seen in asbestos litigation, in which a seriously ill claimant may recover a little while a far less seriously ill claimant hits the jackpot. These lottery effects would be present under the Trilateral Settlement. Professor Green observed that the tort system itself may change significantly in the next five to ten years, creating uncertainty as to the ability of claimants to recover for products liability claims

in the tort system. The Global Settlement eliminates this uncertainty. Guardian's Report at 76-78; Tr. at 2769-70.

395. Professor Green concluded that formal subclasses are not required. That conclusion was based on his view that, to the extent that various subgroups within the Global Health Claimant Class might have conflicting interests, those conflicts are far less significant than the common interests shared by those same subgroups -- the most overwhelming of which is their common interest in avoiding the risk of a loss by Fibreboard in the Coverage Case. Guardian's Report at 78-86; Tr. at 2771-85.

396. Professor Green expressed the view that the Global Health Claimant Class was fairly and adequately represented both by the class representatives and by Plaintiffs' Counsel. In particular, Professor Green emphasized the extensive experience Plaintiffs' Counsel brought to this matter -- and the importance to the Global Health Claimant Class of that experience -- as well as the unending vigor with which they pursued settlement benefits on behalf of the class. Professor Green agreed with the opinion of Professor Hazard that the contingent back-end payments to be paid under the Substitute Ness Motley Agreement only served to cause Plaintiffs' Counsel to redouble their efforts to achieve the best possible settlement for the class. Guardian's Report at 86-89; Tr. at 2785-88.

397. In conclusion, Professor Green stated that the Global Settlement is fair, reasonable and adequate, and should be approved. Guardian's Report at 91-92; Tr. at 2788-89.

XIV. LONGSHORE SETTLEMENT

398. Under LHWCA, certain employers and their insurance carriers (collectively, "Longshore employers") are required to provide compensation to their employees to or certain family members of those employees for injuries and death arising out of their employment. 33 U.S.C. §§ 903(a) and 904(b). In return for requiring a Longshore employer to pay this compensation, LHWCA grants the Longshore employer a number of specific benefits and protections, including the right (under specified circumstances) to "set off" against the Longshore employer's LHWCA obligations any recovery a Person entitled to compensation may obtain in a lawsuit against a third party arising out of the same injury that gives rise to the LHWCA claim. 33 U.S.C. § 933(f). Where the person entitled to compensation recovers as much or more from the third party as the employee would have received from his or her employer under LHWCA for the same injury, then the Longshore employer owes that employee no LHWCA benefits. Id. In addition, if the Longshore employer has already paid LHWCA benefits to the person entitled to compensation prior to the employee's recovery of damages from the third party for the same injury, then the Longshore employer is, by common law, entitled to lien rights against the employee's recovery for an amount equal to the prior payments.[36]

399. Title 33 U.S.C. § 933(g) is designed to prevent a Longshore employer from being wrongfully deprived

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[36] See, e.g., Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 79 (1980), and cases cited therein; Bethlehem Steel Corp. v. Mobley, 920 F.2d 558, 561 (9th Cir. 1990).

of its set-off rights. Under this provision, if the person entitled to compensation obtains a judgment against a third party, or settles for an amount greater than the benefits to which he or she would be entitled under LHWCA, the person entitled to compensation must give the Longshore employer notice of such settlement or judgment. 33 U.S.C. § 933(g)(2). If the person entitled to compensation settles with a third party for an amount less than the LHWCA compensation, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and [sic] by the person entitled to compensation (or the person's representative)." 33 U.S.C. § 933(g)(1).

400. If a person entitled to compensation fails to comply with the applicable notice and approval provisions, "all rights to compensation and medical benefits under [LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits . . . ." 33 U.S.C. § 933(g)(2).

401. During the Fall of 1993, Plaintiffs' Counsel were concerned that Longshore employers might seek to use the execution and consummation of the Global Settlement as a justification for nonpayment of benefits to those members of the Global Health Claimant Class who are also persons entitled to compensation under LHWCA with respect to asbestos-related personal injuries that form that basis of the claims being settled in the instant class action. Specifically, Plaintiffs' Counsel were concerned that Longshore employers might assert that the Global Settlement and related judgment

constitute either (i) a settlement under § 933(g)(1) or (g)(2) of LHWCA as to which the Longshore employers had not been notified and given their approval; or (ii) a judgment under § 933(g)(2) of LHWCA as to which the Longshore employers had not been notified, with the result -in either case -that the affected members of the Global Health Claimant Class would forfeit their rights to compensation from the Longshore employers under LHWCA. Lockwood Aff. at ¶3.

402. Plaintiffs' Counsel believed that such an assertion by Longshore employers would fail as a matter of law. Out of an abundance of caution, however, Plaintiffs' Counsel negotiated for the inclusion in the Global Settlement Agreement of certain provisions intended to prevent the successful assertion of this argument by any Longshore employer. Specifically, § 2.2(B) of the Global Settlement Agreement provides: The claims of Persons providing workers com-ensation benefits to Settlement Class Members shall be directed to the Trust, instead of Fibreboard Corporation or the Insurers, and disposed of pursuant to the Trust Agreement and the Trust Distribution Process. Such Persons providing workers compensation benefits shall have existing remedies, whether by way of lien rights against a Settlement Class Member's Claim against the Trust, subrogation, direct action, or otherwise, against the Trust (instead of Fibreboard Corporation or the Insurers), subject only to the provisions of the Trust Agreement and Trust Distribution Process. Only payment of funds pursuant to a Settlement Class Member's individual settlement with the Trust, and not this Agreement (or the resulting Global Approval Judgment, dismissal and release), shall trigger the notice, approval and forfeiture provisions of the Longshore and Harbor Workers Compensation Act (33 U.S.C. Section 933) and other similar

state and federal workers compensation provisions. Lockwood Aff. at ¶4; Fibreboard Exh. 912 (Global Settlement Agreement) at § 2.2B.

403. The Global Settlement Agreement further provides that it will become fully effective only upon "Global Approval Judgment" -a term defined in the Glossary annexed to the Global Settlement Agreement. As so defined, the requisite Global Approval Judgment (at paragraph i) includes a declaration by the Court "that, as provided in Section 2.2(B) of the Global Settlement Agreement, only payment of funds pursuant to the [Global Health Claimant] Class Members' individual settlements with the Trust shall trigger the notice, approval and forfeiture provisions of the Longshore and Harbor Workers Compensation Act and other similar state and federal workers compensation provisions . . . ." Fibreboard Exh. 912 (Glossary) at ¶ 47(i).

404. Following the execution of the Global Settlement Agreement, motions to intervene in the instant class action were filed in the Spring of 1994 by (i) the Director, Office of Workers' Compensation Programs, United States Department of Labor; and (ii) Roland Dearborn and Kerwin Butcher, two employees who alleged that they sustained exposure to asbestos at a worksite subject to LHWCA, and Mr. Dearborn's wife, Judith Dearborn (collectively, the "Dearborn Intervenors"). The Director and the Dearborn Intervenors questioned whether the provisions of the Global Settlement Agreement and Global Approval Judgment described above would be effective to bind Longshore employers under the provisions of LHWCA. This Court thereafter granted intervention as a matter of right to the Director and permissive

intervention to the Dearborn Intervenors. Lockwood Aff. at ¶ 6; Motion by Roland Dearborn, Judith Dearborn and Kerwin Butcher to Intervene, Dkt. No. 136 (April 19, 1994); Motion to Intervene by Director, Workers' Compensation Programs, Dkt. No. 159 (May 11, 1994); Order Granting Motions to Intervene, Dkt. No. 178 (May 16, 1994).

405. Although Plaintiffs' Counsel disagreed with the positions taken by the Director and the Dearborn Intervenors with respect to the LHWCA issues presented by them, they decided to take still further steps to insure that the Global Settlement did not adversely affect and LHWCA rights held by members of the Global Health Claimant Class. Accordingly, on July 27, 1994, on leave of this Court, Plaintiffs' Counsel filed an amended complaint in this action which, inter alia, (i) added James Ellison as a representative of the Global Health Claimant Class; and (ii) asserted claims for declaratory and injunctive relief against Bethlehem, both in its individual capacity and as a representative of a class of Longshore employers and their insurers as defined in paragraph 49 of the Amended Complaint (the Longshore Defendant Class). In particular, the Amended Complaint sought a declaration that "the entry of Global Approval Judgment and/or consummation of the Global Settlement Agreement will not constitute a 'settlement' under 33 U.S.C. § 933(g) which would operate to create a forfeiture of the LHWCA compensation rights of Plaintiff Class members against members of the Longshore

Defendant Class." Lockwood Aff. at ¶ 7; Amended Complaint, Dkt. No. 304 (July 29, 1994).[37]

406. Following the filing of the Amended Complaint, Mr. Lockwood, as counsel to Plaintiffs' Counsel, engaged in extended arm's length negotiations with Mr. Bauman concerning a possible settlement of the LHWCA claims asserted therein against Bethlehem and the Longshore Defendant Class. There is no evidence or suggestion of any collusion or fraud in this process. In the course of those negotiations, Mr. Lockwood consulted with Plaintiffs' Counsel, counsel for the Director, counsel for other parties to the Global Settlement, counsel for the Dearborn Interventors, counsel for a group of Longshore employers on the West Coast, and counsel for at least one other member of the Longshore Defendant Class. In addition, Mr. Lockwood furnished copies of draft settlement documents being exchanged between him and Mr. Bauman to the other counsel described in this paragraph, and received their comments on those drafts. Lockwood Aff. at ¶ 9.

407. Mr. Bauman, in addition to his negotiations with Mr. Lockwood, also conferred with and sought input from several representatives of Longshore employers. In particular, Mr. Bauman consulted with Mr. Robert Babcock, an attorney who represents a cross-section of Longshore employers and who serves as President and Legal Advisor of the Longshore Claims Association, a not-for-profit association of approximately 130 maritime employers, carriers

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[37]On February 9, 1995, the Court approved an amendment to the Longshore Settlement clarifying the definition of the Longshore Defendant Class. Order, Dkt. No. 731 (Feb. 9, 1995).

and third-party administrators. Mr. Babcock raised several legal issues on behalf of these clients, and these concerns were taken into account in the negotiations. Bauman Aff. at ¶ 3.

408. At the conclusion of the negotiations described above, the Global Health Claimant Class representatives (on behalf of themselves and the Global Health Claimant Class), Bethlehem (on behalf of itself and the Longshore Defendant Class), and the Director executed a Stipulation of Settlement dated as of December 5, 1994, reflecting a settlement of the claims asserted in the Amended Complaint against Bethlehem and the Longshore Defendant Class ("the Longshore Settlement"). Lockwood Aff. at ¶ 10. The Longshore Settlement, if approved, will enable to Court to enter the LHWCA-related judgment provision set forth in the Global Approval Judgment described above. Lockwood Aff. at ¶ 18.

409. Because of the importance of securing a binding determination by this Court of the impact of the Global Settlement on the respective rights under LHWCA of the members of the Global Health Claimant Class and the members of the Longshore Defendant Class, Plaintiffs' Counsel intended -- in the absence of a settlement -to litigate to a final judgment the claims asserted in the Amended Complaint against Bethlehem and the Longshore Defendant Class. Lockwood Aff. at ¶ 21.

410. By the time the Longshore Settlement was concluded, Plaintiffs' Counsel had been considering the issues presented for more than one year, first in connection with the negotiation of the Global Settlement Agreement, and

thereafter in connection with the intervention motions filed by the Director and the Dearborn Intervenors. In addition, Plaintiffs' Counsel were aware of and closely followed the litigation of similar LHWCA issues in the Georgine class action. Finally, during the four months of negotiations that resulted in the Longshore Settlement, Plaintiffs' Counsel performed additional research into LHWCA issues and had extensive discussion concerning those issues with counsel for other parties to the Longshore Settlement and the Global Settlement. Lockwood Aff. at ¶ 22. Likewise, counsel for Bethlehem were fully familiar with workers' compensation law generally, and LHWCA in particular, as well as the provisions of the Global Settlement. Bauman Aff. at ¶¶ 1, 6.

411. Counsel for the parties to the Longshore Settlement were thus fully informed about the LHWCA issues raised in the Amended Complaint, and the Longshore Settlement reflects the parties' informed evaluation of the respective merits of their legal positions with respect to those issues. Although Plaintiffs' Counsel were confident that they would prevail in the event the LHWCA issues were litigated to judgment, they also knew that such litigation could delay obtaining Global Approval Judgment and complicate the process of obtaining approval of the Global Settlement. Lockwood Aff. at ¶ 23. Counsel for Bethlehem concluded that there existed a substantial possibility that Bethlehem would lose a litigation concerning the LHWCA issues presented by the Amended Complaint. Bauman Aff. at ¶ 6.

412. On February 2, 1995, the Court conducted a hearing with respect to the Longshore Settlement. The Settling Parties offered the affidavits of Mr. Lockwood, as

representative counsel for the Global Health Claimant Class, Mr. Bauman, as counsel for the Longshore Defendant Class, and Katherine Kinsella (attesting to the completion of a notice plan with respect to the Longshore Settlement, see Findings of Fact ¶¶ 418-446). In addition, Messrs. Lockwood and Bauman spoke at the hearing concerning the benefits of the Longshore Settlement to their classes. Ronald Lupton, Esq., spoke providing his assent to the settlement on behalf of the Dearborn Intervenors, and Michael Hertzig, Esq., noted that the Director urged the Court to approve the settlement.

413. Only one objection to the Longshore Settlement has been filed with the Court, which consisted of a two-page perfunctory list of objections, along with the assertion that the objector was not a member of the Longshore Defendant Class. No member of either the Longshore Defendant Class or the Global Health Claimant Class appeared at the hearing to voice an objection.

414. Considering all the evidence before it, this Court finds that the Longshore Settlement -by removing a possible obstacle to the entry of a Global Approval Judgment - potentially makes available a guaranteed fund in excess of $1.5 billion to compensate members of the Global Health Claimant Class, persons who might otherwise recover little or nothing for their injuries, while also potentially reducing the net compensation obligations of the members of the Longshore Defendant Class to members of the Global Health Claimant Class. Lockwood Aff. at ¶ 18; Tr. at 2295-96.

415. The Longshore Settlement also protects the interests of the members of the Global Health Claimant Class

by insuring that the Global Settlement will not be determined at some future date to create a forfeiture of the LHWCA rights of such class members. Concurrently, the Longshore Settlement protects the rights of members of the Longshore Defendant Class to (i) obtain liens or credits; (ii) receive notice and an opportunity to approve settlements; and (iii) be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust. Lockwood Aff. at ¶ 19 and Exh. B (Stipulation of Settlement); Bauman Aff. at ¶ 6.

416. The Longshore Settlement does not improperly grant preferential treatment to class representatives or segments of the classes, and there are no differences that exist under the Longshore Settlement with respect to different segments of either the Global Health Claimant Class or the Longshore Defendant Class. Lockwood Aff. at ¶ 20 and Exh. B (Stipulation of Settlement).

417. Based upon the credible evidence, this Court finds that the Longshore Settlement was the product of serious, informed, non-collusive negotiations, and is fair, reasonable and adequate.

XV. ADEQUACY OF NOTICE

418. At the instance of the Settling Parties, notice to the classes in this action has been the most detailed and widespread notice of which this Court is aware.

419. The notice materials proposed by the Settling Parties included an extremely detailed "Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing"; an "Overview of and Questions and Answers on the Global Settlement Agreement and the Ahearn Class Action," designed to explain the notice in a more conversational manner; a newspaper notice advertisement for use in domestic newspapers; a newspaper notice advertisement for use in international newspapers; a notice advertisement to be published in Parade and USA Weekend; a notice advertisement to be published in American Association of Retired Persons Bulletin, Business Week and various trade, association and union publications; the script for a 30-second television notice advertisement; camera-ready materials for use in publications of unions and other organizations; a press release and announcement script for distribution to newspapers, television, radio and wire services; the script to be used by telephone operators when answering calls placed by potential class members to advertised toll-free telephone numbers; various cover letters to be sent with the notification materials; and various other materials. Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlements, for Approval of Notice to the Classes and for Scheduling of Final Fairness Hearing, Dkt. No. 253 (June 28, 1994); Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing (Continental Exh. 28); Overview of and Questions and Answers on the Global Settlement Agreement and the Ahearn Class Action (Continental Exh. 30); Affidavit of Katherine Kinsella, sworn to July 12, 1994 (Continental Exh. 7). The Court has reviewed these materials and finds that the notice campaign accurately, clearly and -- in the case of the primary notice documents -- comprehensively, set forth all pertinent

information that class members would reasonably believe to be material in considering the proposed settlement of this class action.

420. The Settling Parties retained Katherine Kinsella to design and oversee implementation of a notice dissemination plan that would apprise class members of the settlement. Ms. Kinsella is the President of Kinsella Communications and a Senior Consultant to the Kamber Group, a large public relations and communications firm based in Washington, D.C. Tr. at 796-97. Ms. Kinsella specializes in marketing and advertising consultation. Tr. at 798.

421. For the past few years, Ms. Kinsella's primary work has been the design and implementation of class action notice plans -a field in which she has had extensive experience. She designed the national and Canadian notice plan pursuant to which notice was provided to asbestos health claimant and creditors classes in the Manville bankruptcy proceedings. Tr. at 797-98. She was similarly involved in the design and implementation of the national notice plan pursuant to which a class of future asbestos health claimants was provided notice in Georgine. Tr. at 798-99. This Court finds that Ms. Kinsella had more than ample qualifications to design and oversee the implementation of the notification plan in the instant action.

422. The proposed notice dissemination plan called for exhaustive efforts to provide notice to class members through a variety of methods. The Court finds that these efforts were reasonably designed to provide adequate notice to class members. These methods included:

--individual notice, by first class mail, to any potential Global Health Claimant Class member or Global Third-Party Claimant Class member whose name and address either was known or could be ascertained through reasonable efforts. This included any individual who identified himself or herself (or his or her organization) as a potential class member, either by calling one of two widely publicized toll-free "800" numbers (one of which is answered by Spanish-speaking operators) or by calling or writing to Global Health Claimant Class counsel or Global Third-Party Claimant Class counsel;

--notice targeted to numerous unions and other trade and labor organizations at the national, regional, state, and local levels, whose memberships might include members of the Global Health Claimant Class, or whose members might be able to assist in the notification effort;

--an extensive, multimillion dollar paid media campaign, utilizing two rounds of television advertising, including national network, cable and local television spots, newspaper advertisements, as well as advertisements in Parade, USA Weekend, American Association of Retired Persons Bulletin and Business Week;

--notice targeted to numerous professional, trade, industrial or legal publications whose

readership is likely to include either potential members of the Global Health Claimant Class or the Global Third-Party Claimant Class, or lawyers who routinely represent asbestos-related personal injury claimants or members of the Global Third-Party Claimant Class;

--an extensive free media campaign, including public service announcements concerning the proposed settlements via national wire services, national news radio stations, and in print, television and radio outlets in 151 media markets targeted for notification; and

--an international paid media campaign using print advertisements in approximately 40-50 international newspapers. Ahearn Class Action Notification Plan, Continental Exh. 9;

Tr. at 802-14.

423. The only objection related to the proposed notice or notice dissemination plan that was raised prior to the effectuation of that plan was voiced by the Ortiz Intervenors, who argued that it is inherently impossible to provide constitutionally adequate notice to class members who have no presently manifested injury.[38] The Ortiz Intervenors did

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[38]The Flanagan Intervenors suggested, in one sentence and without explanation, that the notice itself was somehow incomplete. Brief of the Maritime Intervenors in Opposition to: Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlements, for Approval of Notice to the (continued...)

not, however, object to the specific contents of the proposed notice or the procedures provided for in the proposed notice dissemination plan submitted to the Court for review. Ortiz Intervenors' Objections to Settling Parties' Joint Motion for Preliminary Approval of the Settlement and Approval of Notice of the Settlement to the Class, Dkt. No. 278 (July 18, 1994), at 33-35.

On July 28, 1994, this Court held a hearing to consider the proposed notice and notice dissemination plan. Counsel for the Ortiz Intervenors, as well as counsel for other objectors, were present in the Courtroom. No objections to the proposed notice or notice dissemination plan were made. At the hearing the Settling Parties also submitted to the Court certain technical and typographical amendments to the notice materials. There was no objection to these amendments. Transcript of Hearing, Dkt. No. 325 (July 28, 1994).

425. On July 29, 1994, this Court issued an Order approving the form and substance of the Notice of Class Action Settlement and Third-Party Claimant Class Settlement and Hearing, as well as the related notification materials, for mailing and publication as set forth in the Ahearn Class Action

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[38](...continued)
Classes and for Scheduling of Final Fairness Hearing, Dkt. No. 280 (July 19, 1994), at 3. As found by this Court herein, however, the notice materials were complete and accurate. Findings of Fact ¶ 419. The Dearborn Intervenors also asserted an objection to the notice, but that objection was mooted by the filing on July 29, 1994 of the Amended Complaint in this action against Bethlehem and the subsequent Longshore Settlement. Memorandum in Support of Longshore Intervenors' Objection to Joint Motion for Approval of Notice to Classes, Dkt. No. 290 (July 22, 1994).

Notification Plan, as amended at the July 28 hearing. This Court determined that "[d]issemination of notice as set forth in such notification plan . . . constitutes the best notice practicable under the circumstances, when given will provide due and sufficient notice to all members of the Global Health Claimant Class . . . , [and] satisfies the requirements of due process and Fed. R. Civ. P. 23 . . . ." Order Preliminarily Approving Class Action Settlements, Approving Notice to the Classes, and Scheduling a Final Fairness Hearing, Dkt. No. 316 (July 29, 1994), at 2-3. Having now reviewed all of the evidence presented, this Court hereby reaffirms its previous findings regarding the notice materials and the notification plan, set forth in its July 29, 1994 Order.

426. In the same Order, this Court further ordered that the Settling Parties commence notification of the members of the Global Health Claimant Class and Global Third-Party Claimant Class pursuant to the notification plan by August 1, 1994, with notice dissemination to be completed within ninety days thereof. The Settling Parties were also ordered to submit to the Court a certificate describing and certifying their compliance with the July 29 Order no later than twenty days before the date of the final fairness hearing in this action. Order Preliminarily Approving Class Action Settlements, Approving Notice to the Classes, and Scheduling a Final Fairness Hearing, Dkt. No. 316 (July 29, 1994), at 3.

427. On October 31, 1994, this Court issued an Order in response to a motion submitted by James Fite, Executive Director of the White Lung Association, to extend the notification period to members of the Global Health Claimant Class until November 10, 1994. Order, Dkt. No. 394

(Oct. 31, 1994). The motion was made on the ground that more time was needed to provide notice to members of the White Lung Association. Motion of White Lung Association, Dkt. No. 393 (Oct. 25, 1994), at 1-2. The Order states, inter alia, that "[a]lthough the Court is of the opinion that notification as approved in this Court's order of July 29, 1994 is more than sufficient, the Court is willing to allow supplementary notice as requested with the understanding that the extension will not affect any other deadlines currently in force, including the November 15, 1994 deadline for objections by all non-intervenor objectors." Order, Dkt. No. 394 (Oct. 28, 1994), at 1.

428. In addition to calling Ms. Kinsella as a live witness at the fairness hearing in this action, Tr. at 796-835, the Settling Parties submitted three reports to the Court, in the form of affidavits of Ms. Kinsella, describing the implementation of the notification plan. Affidavit of Katherine Kinsella, sworn to October 13, 1994 (Continental Exh. 11); Affidavit of Katherine Kinsella, sworn to November 21, 1994 (Continental Exh. 12); Affidavit of Katherine Kinsella, sworn to February 14, 1995 ("Third Kinsella Aff.").

429. The second of the three reports was submitted pursuant to the provision of the Court's July 29 Order requiring the Settling Parties to describe to the Court -- no later than twenty days before the final fairness hearing -- their efforts to comply with the provision of the July 29 Order directing that the notification plan be implemented. Also pursuant to the July 29 Order, the second report was accompanied by a "Certificate of Compliance with Orders Approving Notice to the Classes," certifying, inter alia, that the Settling Parties had in fact

complied with the July 29 Order. Certificate of Compliance with Orders Approving Notice to the Classes (Continental Exh. 13). The third report supplemented the second report, providing the Court with additional information concerning implementation of the notification plan.

430. As set forth in the second of the reports submitted by the Settling Parties (Continental Exh. 12), as of November 16, 1994:

> --notice packages containing a cover letter, the notice document, and the "Overview and Question and Answer" document had been mailed to 520,998 individuals who had requested such package by calling the toll-free telephone number, 589,845 individuals who were sent notice packages in the Georgine class action or who opted out of that action, and 171,669 individuals who worked at locations where Fibreboard asbestos was alleged to have been used;
>
> --notice packages were also sent to tens of thousands of unions, organizations, employers, hospitals, courts, lawyers, insurance companies, and other entities and individuals in the United States and abroad, that either requested such packages or that had been identified as being a potential class member or as having a relationship with potential class members; and

--a 7" by 10" notice advertisement was mailed to 401,437 veterans and to 1,382,189 union members. See also Tr. at 812-13.

431. The Settling Parties conducted an unprecedented paid media campaign to provide notice to class members. Television advertising, consisting of a 30-second notice advertisement, was conducted in two stages. The first stage consisted of 160 televised advertisements shown on national broadcast and cable networks in the United States from August 22, 1994 to September 18, 1994. In addition, 46 advertisements were shown on Spanish-language television networks in the United States from August 22, 1994 to August 31, 1994. The second stage of televised advertisements consisted of 2,859 advertisements in 72 media markets chosen for the likely concentration of class members in those areas between September 19, 1994 and October 2, 1994. Third Kinsella Aff. at ¶ 10.

432. The Court-appointed English-language newspaper notice advertisement was published in 286 newspapers in 151 markets primarily on August 28, 1994. Tr. at 806. In a second round of newspaper advertising, the notice advertisement was published in 171 newspapers in the same 72 specially selected media markets that were used in the second round of television advertisements. Newspaper advertisements were also published in 29 Spanish-language newspapers between August 22, 1994 and September 1, 1994. Continental Exh. 12; Tr. at 806-07. In addition, the newspaper notice was translated into ten foreign languages and was published in 57 newspapers in 21 foreign countries. Third Kinsella Aff. at ¶ 8.

433. Court-approved notice materials were also published in USA Weekend, Parade Magazine, American Association of Retired Persons Bulletin, and numerous union and trade publications. Continental Exh. 12; Tr. at 808. USA Weekend and Parade have a combined circulation of approximately 100 million people. The American Association of Retired Persons Bulletin reaches 22 million people. Tr. at 808. The labor publications have a total circulation of over 2 million people. Tr. at 809.

434. The notice campaign also focused on specifically providing notice to members of the Global Third-Party Claimant Class. For example, notice packages were directly mailed to all entities that had been co-defendants in litigation with Fibreboard, to approximately 6,500 companies involved in shipbuilding, oil and gas refining and exploration, and to thousands of insurance carriers. Tr. at 811-12. In addition, notice advertisements were published in The Wall Street Journal, Business Week and numerous business and trade journals designed to reach members of the Global Third-Party Claimant Class. Tr. at 808-10.

435. The notice dissemination plan carried out in this action cost between $18 million and $20 million, and was the most expensive paid notice campaign ever conducted in the United States. Tr. at 814, 815. The notification plan in this action was more extensive than that approved and conducted in the Manville bankruptcy proceedings and in the Georgine class action. Tr. at 814-15. Ms. Kinsella estimated, for example, that the televised notices alone reached approximately 94.2% of television households in the United States an average of 5.1

times each.[39] Tr. at 80405. In total, more than 1.4 million notice packages were distributed. Tr. at 814.

436. This Court incorporates herein as reliable the reports submitted to the Court by the Settling Parties regarding implementation of the notification plan. The Court likewise finds the testimony of Ms. Kinsella to be credible and reliable. No objector or any other person or party has presented any credible rebuttal to the Settling Parties' evidence regarding implementation of the notice dissemination plan.

437. None of the formal objections to the settlements herein that were filed by the Ortiz Intervenors and the Flanagan Intervenors related to the adequacy of the notice or the notice dissemination plan. Ortiz Intervenors' Objections to the Proposed Settlement, Dkt. No. 396 (Oct. 31, 1994); Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 26, 1994); Objections to the Proposed Global Settlement by the Maritime Intervenors, Dkt. No. 395 (Oct. 31, 1994).

438. Several individuals filed objections that related to the notice of the notice dissemination plan. Timothy P. Dowling asserted that the notice document is deficient on the grounds that it: (i) does not express the likelihood that the insurers will prevail in the Coverage Case appeal in terms of a percentage; (ii) does not indicate the amount of the fees that will be actually paid by the insurers to counsel for the Global Health Claimant Class, nor the number of hours devoted to this matter by such counsel; and (iii) does not adequately explain the nature

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[39] 98.2% of households in the United States have televisions. Tr. at 805.

of the claims and expenses that may be paid from the settlement funds. Objection of Timothy P. Dowling to Global Class Settlement, Dkt. No. 419 (Nov. 10, 1994), at 4-6. This Court finds Mr. Dowlings' objections to be without merit because: (i) there is no need, and it would be inappropriate, for this Court to approve a notice that speculated upon the probable outcome of contested litigation in another court; (ii) fees to be paid to Plaintiffs' Counsel have not yet been determined and hence could not be set forth in the notice; and (iii) the notice accurately and adequately describes the claims and expenses payable from the settlement funds.

439. Mark E. Nelson, on behalf of himself and his minor son, asserted three complaints with regard to the notice dissemination efforts: (i) Mr. Nelson experienced some difficulty in obtaining copies of the Global Settlement Agreement, Third-Party Claimant Class Settlement Agreement and Trilateral Settlement Agreement; (ii) allegedly inadequate efforts were made to provide notice to security guards; and (iii) notice packages, including copies of the settlement agreements, should have been sent to "every residence in every country where Fibreboard asbestos has been distributed." Amended Objections and Petition to Intervene, Dkt. NO. 516 (Dec. 1, 1994), at 2-3. This Court finds Mr. Nelson's complaints do not warrant disapproval of the settlement because: (i) Mr. Nelson in fact received the notice materials; (ii) adequate efforts were made to provide notice to security guards, and security guards are not in a materially different position from other Global Health Claimant Class members with respect to their ability to receive notice; and (iii) it would have been impractical and unnecessarily costly to send copies of the notice materials to

every residence in the numerous countries where Fibreboard asbestos may have been present.

440. Finally, Charles Linder Floyd appears to object on the ground that the notice was provided through the "White controlled media." Motion to Intervene, Dkt. No. 390 (Oct 4, 1994), at 2. Mr. Floyd's objection assumes that persons other than white persons -- and, in particular African-Americans -- did not receive adequate notice through the means described in Ms. Kinsella's affidavits and her testimony. Because there is no support for such an assumption, this Court rejects Mr. Floyd's objection.

441. On December 21, 1994, the Settling Parties moved this Court for approval of a supplemental notice entitled "Supplemental Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing" (the "Supplemental Notice"), containing a description of the Longshore Settlement, a clarification of the operation of the Global Settlement class definitions, and a description of certain amendments to the Global Settlement Agreement and related documents. At the same time, the Settling Parties moved for approval of a plan for the dissemination of the Supplemental Notice. Joint Motion of the Settling Parties for Approval of Supplemental Notice and Notification Plan, Dkt. No. 581 (Dec. 21, 1994). On December 22, 1994, this Court approved the Supplemental Notice and the plan for its dissemination. Order Approving Supplmental Notice and Notification Plan, Dkt. No. 583 (Dec. 22, 1994).

442. Pursuant to the notification plan, the Supplemental Notice was mailed to all potential members of the Global Health Claimant Class and Global Third-Party Claimant Class who were directly mailed the original Notice of Class Action, Global Settlement, Third-Party Claimant Class Settlement and Hearing. In addition, the Supplemental Notice was mailed to all organizations that are not Global Third-Party Claimant Class members that were directly sent the original notice document. In total, 1,513,018 copies of the Supplemental Notice were mailed. Notification Plan Directed to All Parties in Connection with the Longshore and Harbor Workers' Compensation Act and Ahearn, et al., v. Fibreboard Corporation, Dkt. No. 580 (Dec. 21, 1994); Affidavit of Katherine Kinsella, sworn to February 1, 1995, Dkt. No. 714; Certificate of Compliance With Order Approving Notice, Dkt. No. 711 (Feb. 1, 1995).

443. The Settling Parties also moved this Court on December 21, 1994 for approval of a separate notice entitled "Notice of Class Action, Settlement and Hearing" (the "Longshore Notice"), containing a detailed description of the Longshore Settlement. At the same time, the Settling Parties moved for approval of a plan for the dissemination of the Longshore Notice. Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlement, for Approval of Notice to the Class and for Scheduling of Final Fairness Hearing, Dkt. No. 578 (Dec. 21, 1994). On December 22, 1994, this Court approved the Longshore Notice and the plan for its dissemination. Order Preliminarily Approving Class Action Settlement, Approving Notice to the Class and Scheduling a Final Fairness Hearing, Dkt. No. 584 (Dec. 22, 1994).

444. Pursuant to the notification plan, 11,263 copies of the Longshore Notice, together with the Longshore Stipulation of Settlement, were mailed to potential members of the Longshore Defendant Class who had previously been identified and to whom the Global Settlement notice package was sent. In addition, efforts were made to identify other members of the Longshore Defendant Class. As a result of these efforts, 12,280 copies of the Longshore Notice and Longshore Stipulation of Settlement, together with the Global Settlement notice package, were distributed. Notification Plan Directed to All Parties in Connection with the Longshore and Harbor Workers' Compensation Act and Ahearn, et al. v. Fibreboard Corporation, Dkt. No. 580 (Dec. 21, 1994); Affidavit of Katherine Kinsella, sworn to February 1, 1995, Dkt. No. 714; Certificate of Compliance With Order Approving Notice, Dkt. No. 711 (Feb. 1, 1995).

445. On February 2, 1995, at the hearing upon the Longshore Settlement in this Court, the Director suggested that the Longshore Defendant Class definition be clarified to apply specifically as well to Longshore employers that provided benefits under so-called "LHWCA Extensions" -- federal statutes that incorporate and apply LHWCA's provisions to certain other categories of employees.[40] In response to the Director's suggestion, the parties both clarified the definition and distributed a second round of notice to all 23,000 entities who previously were provided notice of the Longshore

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[40]The "LHWCA Extensions" are the Defense Base Act, 42 U.S.C. §§ 1651, et seq., the District of Columbia Workmen's Compensation Act, 26 D.C. Code §§ 501, et seq., the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, et seq., and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 171, et seq.

Settlement. Affidavit of Peter Van N. Lockwood, sworn to February 8, 1995, at ¶¶ 3, 7.

446. In sum, this Court finds that the notice materials used in this class action, and the dissemination thereof, were more than sufficient to supply to factual predicate necessary to comply with the requirements of Fed. R. Div. P. 23 and due process. The evidence in the record amply demonstrates that extensive and massive notice of this class action and the proposed settlement was given to class members.

Signed this 27th day of July, 1995.

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting By Designation

FILED

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In the
Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME III

(Pp. 436 – 600.)

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated,	:	Civil Action
Plaintiffs	: No.	
v.	:	6:93cv526
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,	:	
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:	
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:	

CONCLUSIONS OF LAW

July 27, 1995

CONCLUSIONS OF LAW

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CONCLUSIONS OF LAW

Based in part on the foregoing findings of fact, the Court makes the following conclusions of law.[1]

I. SUBJECT-MATTER JURISDICTION

A. There is a case or controversy

1. There is a justiciable case or controversy so long as there is an "actual antagonistic assertion of rights." United States v. Johnson, 319 U.S. 302, 305 (1943). A controversy exists until "'the issues presented are no longer "live,"'" or "the parties lack a legally cognizable interest in the outcome." Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1153 (5th Cir. 1993) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). The case-or-controversy requirement is met so long as the Court's ruling will affect "tangible legal rights," ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989), and the parties do not call upon the Court merely to render an advisory opinion or to opine "what the law would be on an uncertain or hypothetical state of facts." Id. (quoting Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 262 (1933)).

2. This matter presents an active "Case" or "Controversy." There is an "actual antagonistic assertion of rights" between and among the parties to this action, see

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[1]To the extent the following conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings are hereby adopted by this Court.

Findings of Fact at ¶¶ 1-5; and the Court's ruling will affect their "tangible legal rights" by, inter alia, finally resolving Fibreboard's coverage dispute with Continental and Pacific, enabling the claimant Class to secure access to substantial insurance proceeds and releasing Fibreboard, Continental and Pacific from asbestos-related personal-injury lawsuits. See Findings of Fact at ¶¶ 190-95.

3. That an agreement in principle to settle this action was reached before the complaint was filed does not alter the Court's conclusion. Courts routinely assert jurisdiction over class action settlements and consent decrees filed the very day the related suits are filed. See, e.g., In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville"), 982 F.2d 721, 728-29 (2d Cir. 1992), modified on other grounds, 993 F.2d 7 (2d Cir. 1983); Carlough v. AmchemProds., Inc., 834 F. Supp. 1437, 1465 (E.D. Pa. 1993), aff'd, 10 F.3d 189 (3d Cir. 1993); see also Swift & Co. v. United States, 276 U.S. 311, 326 (1928); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 833-34 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Here, the settlement agreement was not signed until approximately four months after the complaint was filed, and after the parties had negotiated vigorously about its terms and the terms of the Trilateral.

4. The case or controversy requirement is met even though numerous Class members are currently unimpaired. Numerous courts have certified classes that include future claimants. See, e.g., In re Agent Orange Product Liability Litigation (Ivy), 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125; Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa/ 1994); In re Joint Eastern and Southern

Dist. Asbestos Litigation, 133 F.R.D. 425 (E.D.N.Y. 1990). Further, numerous courts have certified class actions that include people with no manifest symptoms or injury. See, e.g., In re Silicone Gel Breast Implant Products Liability Litigation (MDL-926), No. CV 92-P-10000-S, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994); In re Joint Eastern and Southern Dist. Asbestos Litigation, Nos. 90-3973; 90-7518, slip op. at 194-96 (E. & S.D.N.Y. Dec. 15, 1994).

B. The amount-in-controversy requirement

5. For diversity jurisdiction to exist, the amount-in-controversy requirement allegations of damage in excess of $50,000 -must be satisfied. 28 U.S.C. § 1332(a). In determining the amount in controversy, "the sum claimed by the plaintiff controls . . . [unless it] appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (emphasis added]. Although the plaintiffs bear the burden of proving the requisite amount in controversy, see Gibbs v. Buck, 307 U.S. 66, 72 (1939); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936), this burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See Seafoam, Inc. v. Barrier Systems, Inc., 830 F.2d 62, 66 (5th Cir. 1987) ("It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."). In determining the amount in controversy, claims for punitive damages must be included in the computation. See Bell v. Preferred Life Assur. Soc., 320 U.S. 238, 240 (1943).

6. The amount-in-controversy requirement is satisfied because each Class member could lawfully allege damages in excess of $50,000. The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., Manville, supra, 982 F.2d at 734 (asbestos: amount in controversy requirement satisfied although some members were "exposure only"); Carlough v. Amchem Prods. Inc., supra, 834 F. Supp. at 1456-62 (asbestos: same); In re A.H. Robins Co., Inc., 880 F.2d 709, 724-25 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an injury), cert. denied, 493 U.S. 959 (1989); In re Agent Orange Product Liability Litigation, supra, 996 F.2d at 1434 (Agent Orange); Payton v. Abbott Labs, 83 F.R.D. 382, 395 (D. Mass. 1979) (DES), vacated on other grounds, 100 F.R.D. 336 (D. Mass. 1983); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 167 (S.D. Ohio 1992) (defective artificial heart valves), app. dismissed without op., 995 F.2d 1066 (1993).

7. Even if each class member could not meet the amount-in-controversy requirement, the Court would still have subject matter jurisdiction over this diversity case under the Judicial Improvement Act of 1990, 28 U.S.C. § 1367, because the class representatives meet the amount-in-controversy requirement, and therefore all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995).

8. Even if each class member could not meet the amount-in-controversy requirement, and even if the class members did not fall within this Court's supplemental jurisdiction, the amount-in-controversy requirement would still be satisfied for all class members because it is appropriate to aggregate the amounts of the Class members' claims to satisfy the $50,000 jurisdictional amount requirement. The class members share the right to an equitable distribution of the limited resources available to redress their personal injury claims against Fibreboard. See Snyder v. Harris, 394 U.S. 332, 335 (1969). Aggregated, the claims clearly exceed $50,000.

9. That certain jurisdictions do not permit causes of action absent physical injury or limit punitive or other damages in some circumstances does not mean that unimpaired Class members could not lawfully allege damages in excess of $50,000 for such causes of action as medical monitoring, fear of cancer and risk of cancer. A Class member residing in jurisdictions where such causes of action could not be asserted could, for example, bring his or her action in another jurisdiction (such as California, which has personal jurisdiction over Fibreboard) where the causes of action and damages are permitted; make a good faith argument for application of the law or a jurisdiction where the causes of action and damages are permitted; or make a good faith argument for the extension and change of the law. The Court cannot say "to a legal certainty" that such claims -- including their punitive damages component -- are worth less than $50,000.

C. The Insurers' standing to intervene

1. Intervention as of right

10. An applicant must satisfy four requirements to intervene pursuant to Rule 24(a): "(1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit." New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir.) (en banc) (internal quotations omitted), cert. denied, 469 U.S. 1019 (1984). The Insurers have met each of these requirements. Kneeland v. National Collegiate Athletic Ass'n, 806 F.2d 1285, 1289 (5th Cir.), cert. denied, 484 U.S. 817 (1987); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir.), cert. denied, 400 U.S. 878 (1970); Campbell v. Plank, 113 F.R.D. 175, 176 (D. Kan. 1990); Levenfeld v. Clinton, 674 F. Supp. 255, 257, 262 (N.D. Ill. 1987); Roach v. Churchman, 457 F.2d 1101, 1102 (8th Cir. 1972).

2. Permissive intervention

11. Rule 24(b)(2) authorizes permissive intervention in the Court's discretion when "an [intervention] applicant's claim or defense and the main action have a question of law or fact in common," and provides that the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In considering these factors, the Court concludes the Insurers' permissive intervention is appropriate.

II. CERTIFICATION OF THE HEALTH CLAIMANT CLASS

A. Standards for Class Certification

12. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 471-72 (5th Cir. 1986).

13. The Rule 23 requirements apply to all federal class actions; however, they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See In re A.H. Robins Co., Inc., 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir. 1989); Officers for Justice v. Civil Service Com'n of City and County of San Francisco, 688 F.2d 615, 633 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543 (11th Cir. 1987); Bowling, supra, 143 F.R.D. at 158; see also 2 Newberg on Class Actions § 11.28 (3rd ed. 1992); but see In re General Motors Corporation, ___F.3d___, 1995 WL 223209, 63 U.S.L.W. 2659 (3rd Cir. 1995) (rejecting liberalized criteria for settlement classes). Courts have approved settlements and finally certified settlement classes while at the same time holding that class certification for litigation purposes might be improper. See, e.g., Officers for Justice, supra, 688 F.2d at 633; In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707, 713-14 (M.D. Pa. 1978) (court approved class settlement while noting that certification for

litigation purposes would be doubtful), aff'd in part mem. and vacated in part mem. sub nom. Colonial Fuel Co. v. Blue Coal Corp., 612 F.2d 571 (3d Cir. 1979) (table); Wilkes-Barre Steam Heat Co. v. Blue Coal Corp., 612 F.2d 576 (3d Cir. 1979)(table).

B. Rule 23(a) prerequisites

14. Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

15. The numerosity requirement of Rule 23(a) is satisfied. Given the size of the class (Findings of Fact at ¶ 278) joinder of the class members' claims would plainly be impracticable. See Boykin v. Georgia-Pacific Corp., 706 F.2d 1384, 1386 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (317-member class met numerosity requirement).

2. Commonality

16. Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B J. Moore and J. Kennedy, Moore's Federal Practice ¶ 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, supra, 782 F.2d at 472 ("The threshold of commonality is not high," as "the Rule

requires only that resolution of the common questions affect all or a substantial number of the class members"); Walker v. Jim Dandy Co., 638 F.2d 1330, 1336 (5th Cir. 1981). The commonality requirement may be more readily satisfied in the settlement context than in the litigation context. See Conclusions of Law at ¶ 13.

17. There are questions of law and fact common to the class. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Findings of Fact ¶¶ 4, 34, 54, 57, 225, 278, 346. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes substantial insurance proceeds. See Georgine, supra, 157 F.R.D. at 316; 2 Newberg on Class Actions § 11.28, at 11-58-11-60. See also Jenkins, supra, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

2. Typicality

18. "The 'typicality' requirement focuses . . . on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." Jenkins, supra, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and

the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg on Class Actions § 11.28, at 11-58; see also Conclusions of Law at ¶ 13 (typicality more readily satisfied in the settlement context). The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 272 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986); see also Ladd v. Dairyland County Mut. Ins. Co. of Tex., 96 F.R.D. 335, 337 (N.D. Tex. 1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all have a common interest in eliminating the common risk posed by the coverage litigation and securing the maximum possible insurance proceeds. See Jenkins, supra, 782 F.2d at 472.

4. Adequacy of Representation

19. The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, supra, 109 F.R.D. at 273.

a. Class Counsel

20. Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar and were exceedingly well qualified to serve as Class Counsel in

this case. Findings of Fact at ¶¶ 293-97. As set forth more fully below, Class Counsel adequately represented the class. See Conclusions of Law at ¶¶ 60-68.

b. Class representatives

21. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." Jenkins, supra, 782 F.2d at 472; see also Georgine, supra, 157 F.R.D. at 317 ("The key question is whether their interests are antagonistic.") (quoting Steiner v. Equimark Corp., 96 F.R.D. 603, 610 (W.D. Pa. 1983)) (emphasis in original). And "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir. 1981).

22. The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. Findings of Fact at ¶¶ 279-88. The class representatives and the members of the class -- all of whom are equally at risk in the coverage litigation -- are united in seeking the maximum possible recovery for their asbestos-related claims. See Jenkins, supra, 109 F.R.D. at 274.

23. The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class. Findings of Fact at ¶¶ 346, 361.

24. The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. See Findings of Fact at ¶¶ 279-88. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." Georgine, supra, 157 F.R.D. at 317. See Longden v. Sunderman, 123 F.R.D. 547, 559 (N.D. Tex. 1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 77 (N.D. Tex. 1984). "[T]he primary criterion for determining whether the class representative has adequately represented the class . . . is whether the representative through qualified counsel, vigorously and tenaciously protected the interests of the class." Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (emphasis added); accord Sunderman, supra, 123 F.P.D. at 559); Durrett v. John Deere Co., 150 F.R.D. 555, 558 (N.D. Tex. 1993).

C. Certification of the Class under Rule 23(b)(1)(B)

1. The history of mandatory class actions in federal court

25. The federal courts have traditionally employed mandatory class actions to achieve, through a unitary resolution, equitable distribution of assets in which large numbers of claimants have a "common interest." eg., Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302-03, 309 (1854); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 670-72 (1915); see also, e.g., Leadville Coal Co. v. McCreery, 141 U.S. 475, 478 (1891); Dickinson v. Burnham, 197 F.2d 973, 980 (2d Cir. 1952).

26. Judgments in class actions seeking equitable distribution of assets in which all claimants share a "common interest" are binding on all class members, even though class members' claims are a collection of money damage claims, and even though many of the class members lack any connection with the forum court. Smith, supra, 57 U.S. at 300-03; Ibs, supra, 237 U.S. at 672; see also Leadville, supra, 141 U.S. at 478; Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921).

27. The Supreme Court and federal appellate courts have consistently upheld traditional mandatory class actions of this and related nature, provided the absent class members were adequately represented. See e.g., Hansberry v. Lee, 311 U.S. 32 (1940); Sovereign Camp of the Woodmen of the World v. Bolin, 308 U.S. 66, 78-79 (1938); Supreme Tribe of Ben Hur, supra; Hartford Life Insurance Co. v. Barber, 245 U.S. 146, 149 (1917); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531, 542-43 (1915); see also Kincade v.

General Tire and Rubber Co., 635 F.2d 501, 506-08 (5th Cir. 1981); Robertson v. National Basketball Ass'n, 556 F.2d 682, 685-86 (2d Cir. 1977); see also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950) (in suit for judicial settlement of accounts, the need for a unitary and final adjudication "[could] be served only if interests or claims of individuals who are outside of the State could somehow be determined" and, hence, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified") (emphasis added).

28. The rules of procedure applicable in the federal courts have long endorsed the traditional role of mandatory class actions in achieving equitable distribution of assets among multiple claimants.

(a) In the years prior to the adoption of the Federal Rules of Civil Procedure, Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no opt-out class actions were recognized," provided that "'absent parties could be bound by . . . judgments pursuant to this provision.'" 1 Newberg on Class Actions, supra, §1.09 at 1-24 (quoting In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville"), 129 B.R. 710, 804 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified, 993 F.2d 7 (2d Cir. 1993)).

(b) Original Rule 23 (contained in the 1938 version of the Federal Rules of Civil Procedure) preserved the binding nature of traditional class actions, including those seeking equitable distribution of assets. In addition, Rule 23 for the first time extended the class-action mechanism to actions at

law, and in doing so created a new category of nonbinding class action. The Rule thus distinguished among three types of actions: "true," "hybrid," and "spurious." The first two of these categories were mandatory -- i.e., they encompassed the traditional binding, no-opt-out class actions recognized by the case law; the third, "spurious," category, was essentially a permissive joinder device, binding class members only if they affirmatively opted into the class. 1 Newberg on Class Actions, supra, § 1.09 at 1-26 1-27; 3B James Moore & John E. Kennedy, Moore's Federal Practice ¶ 23.31[1], at 23-235 (1992); see also Dickinson, supra, 197 F.2d at 979-80 (class actions seeking equitable distribution of assets were binding, or mandatory, under the 1938 version of Rule 23).

(c) The 1966 amendments to Rule 23 promulgating the current form of Rules 23(b)(1) and 23(b)(2) preserved the "true" and "hybrid" categories in slightly modified form. Those sections of the Rule accordingly encompass traditional class actions and preserve their mandatory, non-opt-out quality. "Spurious" actions, by contrast, were replaced by the present Rule 23(b)(3) "common question" class action. See Marvin E. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 43 (1967); 3B Moore's Federal Practice, supra, ¶ 23.31[1], at 23-235; see also 1 Newberg on Class Actions, supra, § 1.09 at 1-25 ("Antecedents of the modern limited fund class action may be found in the hybrid class suit [under prior Rule 23].").

29. Class actions certified pursuant to Rules 23(b)(1) and 23(b)(2) are thus predominantly equitable in nature. See 1 Newberg on Class Actions, supra, § 1.19 at 1-46. For example, as to cases under subdivision (b)(1)(B): "though

they involve money claims individually," such cases are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature," id. § 1.18 at 1-47. See also, e.g., Manville at 832.

2. Application of Rule 23(b)(1)(B)

30. Rule 23(b)(1)(B) calls for certification of a mandatory class if the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of. . .
>
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

31. This Rule is to be interpreted according to its "plain meaning." See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty or even a better-than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as "more than a mere possibility" but "less than a preponderance." Manville, supra, 129 B.R. at 765; accord In re

Granada Partnership Securities Litigation, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); In re Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher"), 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990); In re First Commodity Corp. of Boston Customer Account Litigation, 119 F.R.D. 301, 312 (D. Mass. 1987); Jenkins, supra, 109 F.R.D. at 276-77; In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713 (E.D. Mich. 1985); In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

a. Risk resulting from the coverage litigation

32. If separate actions by Class members were permitted, there would be a risk that early individual adjudications would consume all available assets, and that Class members who won the race to the courthouse would achieve recoveries denied to thousands of later claimants. That risk would exist whether the coverage litigation were to proceed or whether the Trilateral Agreement were approved. Findings of Fact at ¶¶ 225-30, 233-36, 238, 274.

33. The risk that available funds could be inadequate to pay all claims constitutes a risk of "substantial[] impair[ment]" under rule 23(b)(1)(B). The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution; mandatory class certification is thus appropriate for the same reasons as have been invoked throughout history. Conclusions of Law ¶¶ 25-29, and cases cited therein. Numerous courts applying Rule 23(b)(1)(B) have

certified classes under the Rule where allowing separate actions would have crated a risk that early individual adjudications would have exhausted all available assets.[2]

34. Rule 23(b)(1)(B) certification does not require a fixed asset or piece of property in which all class members have a preexisting interest. See, e.g., In re Drexel Burnham Lambert Group, Inc., 130 B.R. 910, 920 (S.D.N.Y. 1991) and 960 F.2d 285, 292 (2d Cir. 1992); In re Silicone Gel, supra; In re Granada, supra, 803 F. Supp. at 1244; County of Suffolk, supra, 710 F. Supp. at 1418; Eagle-Picher, supra, 134 F.R.D. at 34; Coburn, supra, 77 F.R.D. at 45. See also Newburg on Class Actions, supra, §17.15A at 3S-27-28.

35. The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers, and the claims of all class members against Fibreboard and the insurers. The Global Settlement involved a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted

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[2]See, e.g., Manville, supra, 982 F.2d 721, 738-39 (2d Cir. 1992); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992), cert. dismissed, 113 S. Ct. 1070 (1993); In re Silicon Gel Breast Implant Products Liability Litigation (MDL) 926), CV 93-P-11433-S (N.D. Ala., June 1, 1993); In re Granada Partnerships Securities Litigation, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); Eagle-Picher, supra, 134 F.R.D. at 35; County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990); Bush v. Rewald, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D. Haw., Sept. 4, 1986); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); Coburn v. 4-R Corp., 77 F.R.D. 43, 45-46 (E.D. Ky. 1977). See also Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 276 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

from a unique set of circumstances not likely to be repeated. Findings of Fact at ¶¶ 269-72. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses -- a situation that falls squarely under Rule 23(b)(1)(B). See In re Jackson Lockdown, 107 F.R.D. at 708, 712; In re A.H. Robins, 85 B.R. at 380.

36. Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute, is not at issue in this case. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and, provided that the defendant had adequate funds to pay all class members' claims, there might be no "impair[ment]," substantial or otherwise, to class members' "ability to protect their interests." Instead, the class members could go out and secure whatever is their due through litigation. The destruction of the settlement fund here, in contrast, constitutes a "risk" within the meaning of rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear entirely if the settlement were to fall through -- with the result that Class members could then not secure their due through litigation.

b. Limited fund

37. A class may be certified under Rule 23(b)(1)(B) irrespective whether a "limited fund" may be said to exist. See White v. National Football League, 822 F. Supp. 1389, 1411 (D. Minn. 1993), aff'd on other grounds, 41 F.3d 402 (8th Cir. 1994); Specialty Cabinets & Fixtures v. American Equitable, 140 F.R.D. 474, 477 (S.D. Ga. 1991). Because separate actions would create a risk of "substantial[] impair[ment]" to Class members, it is not necessary for the Court to analyze the case in terms of the existence of a "limited fund."

38. Alternatively, the disputed insurance asset liquidated by the $1.535 billion Global Settlement may be viewed as a "limited fund" requiring equitable distribution through mandatory class certification under rule 23(b)(1)(B). That "limited fund" resulted from incontrovertibly arms'length bargaining that liquidated the insurance coverage, which was subject to massive, protracted and on-going litigation. Findings of Fact at ¶¶ 36-47, 89-181, 203. See, e.g., In re A.H. Robins, supra, 880 F.2d at 741 (settlement of coverage dispute "creat[ed] a fund in which all [class members] would have a common interest. This is the classic type of 'limited fund' embraced within the authorization of subsection (b)(1)(B) of Rule 23"); cough. In re Granada, supra, 803 F. Supp. at 1244 (assigning zero value to "claims of additional insurance" in determining whether insurance fund was a limited fund because "the prospects for success [on those claims] are uncertain").

39. Alternatively, the "limited fund" may be viewed as the sum of the value of Fibreboard plus the value of

its insurance coverage. See In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 724 (E.D. N.Y. 1983) (noting that in mass tort litigation, the "limited fund" is generally construed to be the assets of the defendants as extended by insurance coverage and the insurer's assets). Where insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value. See In re A.H. Robins, supra, 880 F.2d 709. The sale value of Fibreboard is at most $235 million. Findings of Fact at ¶ 265. The funds available to resolve Global Health Claimant Class claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement, are approximately equal to the funds available under the Global Settlement, so the insurance asset may be valued at no more than $1.535 billion. Findings of Fact at ¶ 232. Under this scenario, the limited fund would equal at most approximately $1.77 billion.

40. As there is a significant risk that the "limited fund" would be insufficient in the tort system, Rule 23(b)(1)(B) certification is in order. See, e.g., In re A.H. Robins, supra, 880 F.2d at 741; In re Granada, supra, 803 F. Supp. at 1244; Bush, supra, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999.

c. The Intervenors' objections

41. Mandatory class certification does not violate the Rules Enabling Act, 28 U.S.C. § 2072. Class members' substantive rights to full in personam judgments are not being "abridged" because an "arbitrary limit" is being set on the amount of damages that some class members might receive

in the tort system. Mandatory class certification under Rule 23(b) (1)(B) of the Rules of Civil Procedure will not set any such limit on tort system rights: the settlement will. Every settlement involves such a compromise.

42. That Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is fair. Drexel, supra, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., In re Granada, supra, 803 F. Supp. at 1244; Bush, supra, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all. Findings of Fact at ¶¶ 222 243. Moreover, the Class here has in substance been given value equal to all of Fibreboard's equity. Findings of Fact at ¶ 171.

43. Potential insolvency does not make Rule 23(b)(1)(B) inapplicable. See Manville, supra, 982 F.2d at 737-39; Drexel, supra, 960 F.2d at 292. The Rule was intended to operate in potential insolvency situations. See Advisory Committee Notes to Proposed 1966 Amendments to Federal Rules of Civil Procedure, reprinted in 39 F.R.D. 69, 101 (1966) (Rule 23(b)(1)(B) "applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the

property to his claim, when the debtor's assets are insufficient to pay all creditors' claims") (emphasis added). The Bankruptcy Code disclaims exclusivity and allows for nonbankruptcy alternatives. See 11 U.S.C. § 305(a)(1); see also, e.g., H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978); In re Colonial Ford, Inc., 24 B.R. 1014 (Bank. D. Utah 1982); In re Michael S. Starbuck, Inc., 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981). The holding in In re Joint Eastern and Southern Dist. Asbestos Litigation (Keene), 14 F.3d 726 (2d Cir. 1993), is not to the contrary. Dictum in that case pertaining to the purported exclusivity of bankruptcy is (a) refuted by Second Circuit precedent (Manville, supra, 982 F.2d at 736-39; Drexel, supra, 960 F.2d at 292) and (b) irrelevant to this case, where bankruptcy was not a viable option for the Class. Findings of Fact at ¶¶ 35, 264.

44. The exercise of jurisdiction over people unknown or unborn is essential, not only, for example, to settle disputes, quiet title and effect equitable distributions, but also to protect and further the interests of the unknowns and unborns. Courts have properly invoked their equitable power in class actions or other cases involving multiple claimants where members of the class are unknown, unborn or incompetent, so long as those members have been adequately represented. See, e.g., Klugh v. U.S., 818 F.2d 294, 301 (4th Cir. 1987); Hatch v. Riggs Nat. Bank, 361 F.2d 559, 565 (D.C. Cir. 1966); Meyer v. Citizens & Southern Nat. Bank, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988); Mabry v. Scott, 124 P.2d 659, 664 (Cal. App.), cert. denied, 317 U.S. 670 (1942). This Court's judgment may bind people who may not yet know whether they have been injured by asbestos or unborn people, so long as appropriate procedures

are used, such that those people are adequately represented. See, e.g., Hatch, supra, 361 F.2d at 565-66.

45. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), does not require that the Class members be afforded an opportunity to opt-out. In traditional, unitary class actions (i.e., actions of the type within Rules 23(b)(1) and 23(b)(2)) absent class members' due process rights are satisfied so long as they receive adequate representation. See Hansberry, supra; Hartford Live Insurance Co. v. Ibs, supra; Smith v. Swormstedt, supra; Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 981); see also Restatement (Second) of Judgments, § 41(1)(e) & (2); id., Comment f.

46. Shutts did not change this long-standing rule, rather it endorsed the Hansberry standard. See 472 U.S. at 808. Shutts held only that in connection with class actions seeking wholly or predominantly damages -- that is, class actions brought pursuant to the state-law analogues of Federal Rule of Civil Procedure 23(b)(3) -- plaintiffs beyond the jurisdictional reach of the court must be given a right to opt out of the class. See Phillips Petroleum v. Shutts, supra, 472 U.S. at 811. Shutts did not apply to class actions -- such as the one before the Court -- seeking equitable relief. See id. at 811 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief" (emphasis added)). See also In re Agent Orange, supra, 996 F.2d at 1435.

47. If the Supreme Court had intended its holding in Shutts to apply to cases arising under sections other than Rule 23(b)(3), thereby changing years of practice and effectively invalidating many of the types of cases customarily brought under Rules 23(b)(1) and 23(b)(2), it would have said so. See 1 Newberg on Class Actions, supra, § 1.21 at 1-49. Many other courts have concluded that Shutts does not have this effect. See, e.g., Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1994); Grimes v. Vitalink Communications Corp, 17 F.3d 1553, 1560 (3d Cir. 1994); Arnold v. United Artists Theater Circuit, 1994 U.S. Dist. LEXIS 15345 (N.D. Cal. September 15, 1994); White v. National Football League, 822 F. Supp. 1389, 1410-12 (D. Minn. 1993), aff'd on other grds., 41 F.2d 402 (8th Cir. 1994); Nottingham Partners v. Dana, 564 A.2d 1089, 1101 (Del. Super. Ct. 1989); Manville, supra, 129 B.R. at 832; In re Jackson Lockdown/MCO Cases, supra, 107 F.R.D. at 713-14 (E.D. Mich. 1985); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302-05 (2d Cir. 1990). But see Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed as improvidently granted, 114 S. Ct. 1359 (1994); Waldron v. Raymark Indus., inc., 124 F.R.D. 235 (N.D. Ga. 1989).

48. Shutts is inapplicable for yet another reason. Shutts involved a 23(b)(3)-analogue class action brought in Kansas state court, and resolved the question of the due process rights of class members who did not have minimum contacts with Kansas. This, however, is a federal court, and therefore the appropriate focus is on the question of minimum contacts with the nation. Federal courts can exercise adjudicatory power at least with respect to all persons and property located in the United States. United States v. Union

Pac. R. Co., 98 U.S. 569, 604 (1878). See also Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

49. Rule 23 authorizes the federal courts to certify nationwide class actions. See Califano v. Yamasaki, 442 U.S. 682, 702 (1979). This is a class action in a federal court, Rule 23 is fully applicable, and therefore the Court has jurisdictional power over the nationwide class, regardless of whether the individual class members have minimum contacts with Texas.

d. Conclusion

50. The Health-Claimant Class should be certified for settlement purposes under Rule 23(b)(1)(B) with respect to its affirmative claims.

D. Rule 23(c)(4): No Need for Subclasses

51. Rule 23(c)(4)(B) of the Federal Rules of Civil Procedure provides that "a class may be divided into subclasses" "where appropriate." The decision whether to subclass rests within the discretion of the district court. See, e.g., Clark Equip. Co. v. International Union, Allied Indus. Wkrs. of America, 803 F.2d 878, 880 (6th Cir. 1986), cert. denied, 480 U.S. 934 (1987); Mendoza v. Tucson School Dist. No. 1, 623 F.2d 1338, 1349-50 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981). "Subclassing," however, "is not encouraged," (Long Island Lighting Co., supra, 710 F. Supp. at 1447; Georgine, supra, 157 F.R.D. at 318), because it "often

leads to more complex and protracted litigation" (Clark, supra, 803 F.2d at 880) and "compound[s] confusion and cost," County of Suffolk, supra, 710 F. Supp. at 1447; see, e.g., In re Agent Orange Product Liability Litigation, supra, 996 F.2d 1425, 1436 (2d Cir. 1993); Manual for Complex Litigation, § 30.16, at 206. There is a presumption against subclassing: "a certified class is assumed to be sufficiently harmonious and unified in interest that one set of attorneys can and should represent it adequately." Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 547 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981). This presumption is overcome only when the proponent of subclassing successfully bears the burden of demonstrating that class members have potentially antagonistic interests and that subclasses "will materially improve the litigation." Clark, supra, 803 F.2d at 880; see United States Parole Commission v. Geraghty, 445 U.S. 388, 408 (1980) (proponent of subclassing bears burden on issue); Manual for Complex Litigation, § 30.16, at 206 ("The court should authorize . . . subclasses only to the extent that the need is clearly demonstrated."). The intervenors have not borne this burden. Findings of Fact at ¶¶ 344-69. See In re Corrugated Containers Antitrust Litigation, supra, 643 F.2d at 208; Manville, supra, 993 F.2d at 9-11; Georgine, supra, 157 F.R.D. at 318. Neither the Ortiz Intervenors nor the Maritime Intervenors have met this burden.[3]

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[3]The Maritime Intervenors have provided no reason why a maritime subclass is necessary, and the Court rejects their request for one. The Maritime Intervenors' position appears to be based upon McDermott, Inc. v. AmClyde, Inc., 114 S. Ct. 1461 (1994), which, they contend, established a unique judgment reduction rule for maritime law. McDermott, however, established no such rule. Even if it had, the Maritime Intervenors' demand for a subclass would still fail because the Global Settlement preserves all applicable judgment reduction rules; so, if there were a special maritime rule, it would not be affected

(continued...)

E. Conclusion

52. It is proper to grant final certification to the mandatory settlement class defined in the Global Settlement Agreement.

III. FAIRNESS OF THE SETTLEMENT

A. Factors for assessing fairness

53. Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate and reasonable." Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982); In re Corrugated Container Antitrust Litigation, supra, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986); Holmes v. Continental Can, 706 F.2d 1144, 1160 (11th Cir. 1983); Cotton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

54. There is a strong presumption in favor of the settlement's fairness. Parker, supra, 667 F.2d at 1209; Cotton v. Hinton, supra, 559 F.2d at 1331; Mashburn v. National Healthcare, Inc., 684 F. Supp. 660, 667 (M.D. Ala. 1988); Manual for Complex Litigation, § 30.41 (2nd ed. 1985).

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[3](...continued)
by the Global Settlement.

55. The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." United States, supra, 517 F.2d at 850. Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." Cotton, supra, 559 F.2d at 1130 (some citations omitted).

56. The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class-action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representative and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983). All factors support approval of the Global Settlement here. Findings of Fact at ¶¶ 89-181, 203 (no fraud or collusion); ¶¶ 11-21 (complexity); ¶¶ 23-26, 33 (discovery); ¶¶ 36-57, 222-43, 255-59 (recovery); ¶ 203 (knowledgeable opinion).

B. The objections to the settlement's fairness

57. The Ortiz Intervenors contend that the settlement is unfair because Class members are giving up rights they would otherwise have: to obtain punitive damages and preand post-judgment interest against Fibreboard; to hold Fibreboard liable for other manufacturers' liability share; to obtain more than $500,000 in compensatory damages from Fibreboard; to file suit in the tort system immediately; and to pursue Fibreboard itself. The settlement is not unfair simply because the Class gave something up; the question is whether the Class received enough in return. As a practical matter, none of the surrendered rights was of great consequence to the Class. See Findings of Fact at ¶¶ 255-59. The benefits of the settlement to the Class, described above and in the Findings of Fact, greatly outweigh the concessions made by the Class.

58. The Ortiz Intervenors also argue that the existence of the Trilateral Agreement obviates any need or justification for these concessions. The Trilateral was entered into as a back-up to the Global Settlement, not an alternative, and the Court takes the settlement as the parties negotiated it. See Evans v. Jeff D., supra; Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1172 (5th Cir. 1978). In addition, the Court has found that the Trilateral Agreement would provide hundreds of millions of dollars less to the Class as a whole, presents a significant risk of leaving many Class members with no recovery at all, and subjects Class members to the inefficiencies, burdens and delays of the tort system. Findings of Fact at ¶¶ 231-39.

C. Conclusion

59. The proposed settlement is fair, adequate, and reasonable to the class within the meaning of Rule 23(e).

IV. ADEQUACY OF COUNSEL

60. In order to approve the Global Settlement, the Court must be satisfied that Class Counsel adequately represented the Class. Conclusions of Law at ¶¶ 14, 19, 20. Under the applicable test, the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the Class. "It is, ultimately, in the settlement terms that . . . adequacy of [] representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel." In re Corrugated Container, supra, 643 F.2d at 212; accord Parker, supra, 667 F.2d at 1211; Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co., 834 F.2d 677, 684 (7th Cir. 1987).

61. There is no evidence here that Class Counsel's clients other than the Class lacked the same "general interests" as the Class, or that "specific features of the settlement sacrificed" the Class's interests to the interests of Class Counsel's other clients. In re Corrugated Container, supra, 643 F.2d at 208; see Findings of Fact at ¶¶ 315-317, 327-31. Accordingly, the Ortiz and Maritime Intervenors have not "point[ed] to a trade-off of their rights and actual prejudice," and have therefore failed to rebut the presumption that counsel who negotiated a fair settlement represented the class adequately. In re Chicken Antitrust, supra, 669 F.2d at 237; see

In re Corrugated Container, supra, 669 F.2d at 212; In re Agent Orange, supra, 800 F.2d at 19-20.

62. Moreover, as a result of the Court's appointment of a guardian ad litem and the extensive review the guardian conducted, the fairness determination is all the more dispositive of the adequacy-of-counsel issue.

63. The court hereby concludes that counsel adequately represented the class.

64. The Ortiz Intervenors' contend that Class Counsel was under a conflict of interest during the negotiations, and that, therefore, the Global Settlement should not be approved.[4]

65. Conflicts and other ethical issues before this Court are governed by "the ethical rules announced by the national profession in light of the public interest and the litigants' rights." In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992). The ethical rules have been developed and intended for use in the "traditional" lawyer-client context and "should not be mechanically applied to the problems that arise in the settlement of class action litigation," lest their categorical application "have a serious adverse effect on class actions." In re Agent Orange Product Liability Litigation, 800 F.2d 14, 19

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[4]Two expert witnesses have testified in this proceeding as to whether Class Counsel were under a conflict. Professor Hazard testified that they were not. Professor Leubsdorf testified to the contrary. Because the issue is a mixed question of fact and law for the Court to decide, this Court may be guided by the expert testimony, but is not bound by it. See, e.g., In re Solerwitz, 848 F.2d 1573, 1578 (Fed. Cir. 1988); Georgine, supra, 157 F.R.D. at 327.

(2d Cir. 1986); see In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring), cert. denied, 472 U.S. 1008 (1985); Georgine, supra, 157 F.R.D. at 326; 3 Newberg on Class Actions, § 15.01 at 15-3.

66. Rule 1.7(b) of the ABA Model Rules of Professional Conduct, governing conflicts of interest, provides, in pertinent part, that:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another clientor to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation . . . .

67. Under these authorities and for the reasons set forth in Findings of Fact at ¶¶ 300-76, the court concludes that class counsel acted ethically at all times during the negotiations. See Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1426-27 (D. Minn. 1987).

68. The Court therefore concludes that Class Counsel professionally, adequately and ethically represented the Class.

V. ADEQUACY OF NOTICE

69. Rule 23(e) requires that the Class be given notice of the proposed settlement. That notice is required to be given "in such manner as the Court directs," and the Court has considerable discretion in determining what notice is appropriate. See, e.g., Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979); Battle v. Liberty Nat. Life Ins. Co., 770 F. Supp. 1499, 1521 (N.D. Ala. 1991), aff'd, 974 F.2d 1279 (1992), cert. denied, 113 S. Ct. 2999 (1993).

70. The largest notice campaign in history was conducted, likely notifying over a hundred million persons. Findings of Fact at ¶¶ 418-36, 441-42. The requirements of Rule 23(e) and the Due Process Clause have been wholly satisfied.

71. The Court rejects the Ortiz Intervenors' contention that presently uninjured future claimants can never be adequately notified under any circumstances. Every court to have considered this argument has rejected it, as does this Court for the reasons set forth by those authorities. See, e.g., Carlough v. Amchem, supra, Civ. No. 93-0215, at 39-42 (Oct. 27, 1993); In re "Agent Orange" Product Liability Litigation, supra, 100 F.R.D. at 728-29; In re Johns-Manville Corp., 78 B.R. 407, 408-09 (S.D.N.Y. 1987), aff'd, 843 F.2d 636 (2d Cir. 1988); In re A.H. Robins, supra, 880 F.2d at 717, 752; see also In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926), Master File CV 92-P-1000-8 (N.D. Ala. Sept. 10, 1993).

VI. THE LHWCA SETTLEMENT

72. The Court concludes that the LHWCA class satisfies the requirements of Rule 23(a), and the action itself, which seeks declaratory and injunctive relief, satisfies Rule 23(b)(2). Conclusions of Law at ¶ 12; Findings of Fact at ¶¶ 275, 278, 292, 299. In assessing the fairness, adequacy and reasonableness of the LHWCA settlement, the Court applies the six-factor test described above. Conclusions of Law at ¶ 56. Upon reviewing the record, the Court concludes that (a) the LHWCA settlement is not the product of fraud or collusion; (b) the legal issues in the LHWCA context are sufficiently complex, and would be expensive to brief and argue; (c) there was adequate discovery; (d) the LHWCA class had little likelihood of successfully opposing an application for declaratory and injunctive relief against them; and (e) knowledgeable opinion supports the settlement. Findings of Fact at ¶¶ 398-417.

73. Applying the same legal standards to the LHWCA notice as set forth above, the Court finds that the LHWCA notice and its dissemination (Findings of Fact at ¶¶ 441-46) were fully satisfactory.

VII. THE THIRD-PARTY SETTLEMENT

A. Class certification

74. For the reasons given in the succeeding paragraphs, the Third-Party Claimant Class meets the prerequisites of Rule 23(a) and should be certified as a mandatory defendant class under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2).

75. The numerosity requirement is satisfied; Findings of Fact at ¶ 278; conclusions of Law at ¶ 14.

76. As to commonality, all third-party class members have a common interest in (1) eliminating the risk posed by the coverage litigation and facilitating a resolution that provides substantial funds to pay Fibreboard's liability share and (2) avoiding joint-and-several liability for Fibreboard's share by securing a fair process for obtaining set-offs, credits and/or subrogation rights. Major issues presented against the class are therefore common to all of its members, including: (1) whether substantial insurance proceeds will be available to provide compensation to plaintiffs reflecting Fibreboard's liability share; (2) whether a bar order against third-party claims would be appropriate in order to implement a settlement among plaintiffs, Fibreboard and the Insurers; and (3) whether it is appropriate to cut off class members' rights to litigate third-party claims against Fibreboard and/or the Insurers and to some degree curtail their contribution and indemnification rights in order to facilitate a resolution of the coverage dispute and establishment of a process for obtaining set-offs, credits and contribution rights.

77. Typicality is likewise established. The defenses of the third-party class representative, Owens Illinois, arise from the identical events, practices and course of conduct as those of the remainder of the class. Class members are all governed by the same settlement, and their defenses to the Insurers' and Fibreboard's counterclaims seeking declarations regarding the fairness of that settlement and injunctions implementing it are thus of similar origin.

78. Finally, Owens-Illinois has adequately represented the third-party class. Owens-Illinois has been sued in thousands of asbestos-related personal injury suits throughout the country. Its relevant interests in ensuring that the maximum amount of money is available from either Fibreboard or the insurers to pay Fibreboard's liability share, in the treatment of whatever rights it may have to contribution or indemnification, and in preserving its rights of set-off, credits or subrogation against the Trust, are the same as those of all other members of the class. The Court also concludes that Owens-Illinois' counsel were well-qualified to represent the Class. Findings of Fact at ¶¶ 289-91, 298.

79. Any variations in interest among third-party class members are minor, are dwarfed by the overarching common interests all class members share, and do not render OwensIllinois' interests "antagonistic" for representation purposes. See, e.g., In re Corrugated Container, supra, 643 F.2d at 208; Georgine, supra; Jenkins, supra, 109 F.R.D. at 274.

80. Objectors Celotex and Carey Canada have provided no support for their claim that Owens-Illinois does not adequately represent their interests because they are in bankruptcy reorganization, and there is no basis for their position. Their argument is rejected.

81. Certification of the third-party class under Rule 23(b)(1)(A) will avoid the risk that multiple courts would render inconsistent or varying adjudications with respect to the Insurers' and Fibreboard's counterclaims seeking declarations as to the fairness of the third-party settlement and injunctions against all third-party class members. Differing adjudications as

to those matters would subject the Insurers and Fibreboard to incompatible standards of conduct. See Fed. R. Civ. P. 23(b)(1)(A).

82. Certification under Rule 23(b)(1)(B) is likewise appropriate. If Fibreboard and the Insurers were required to prosecute their counterclaims separately as against individual third-party class members, there would be a risk that adjudications would result disapproving the settlement and permitting separate actions by third-party class members against Fibreboard and/or the Insurers. For the reasons given above, permitting any such separate actions by third-party class members would risk substantially impairing the interests of the remainder of the third-party class by depleting the limited assets available to pay Fibreboard's liability share and by destroying the Global Settlement fund. Conclusions of Law at ¶ 32.

83. Finally, Fibreboard and the insurers, in settling disputes with the plaintiff and third-party classes, have acted on grounds generally applicable to the third-party class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to that class as a whole. Certification under Rule 23(b)(2) is thus appropriate as well.

B. Fairness of the settlement

84. The Court recognizes that the interests of the third-party class is in large part aligned with those of the Health-Claimant class. Each desires that the maximum amount of money be paid to claimants by Fibreboard and the Insurers in satisfaction of Fibreboard's liability share, thus eliminating risk

that third-party class members would have to absorb Fibreboard's share under joint-and-several liability.

85. In assessing the fairness, adequacy and reasonableness of the third-party settlement, the Court applies the six-factor test described above. Conclusions of Law at ¶ 56. Upon review of the record, the Court is satisfied (a) that the third-party settlement was not the product of fraud or collusion (Findings of Fact at ¶ 216); (b) that third-party asbestos litigation is extremely complex and expensive (Findings of Fact at ¶ 212); and (c) that sufficient discovery has been taken in the asbestos litigation to permit intelligent evaluation of the third-party settlement (Conclusions of Law at ¶ 56).

86. With respect to the fourth and fifth factors, all alternatives to the settlement are less favorable to the Class. The third-party settlement is greatly preferable from the class's standpoint to a continuation of the coverage litigation. Moreover, the possibility that the plaintiffs, the Insurers and Fibreboard would agree to a global settlement without also concluding a settlement of third-party claims is likewise a disadvantageous one. In the absence of the third-party settlement, Insurers and Fibreboard could well have been entitled to a bar order against third-party claims, leaving the third-party class without many of the benefits of the settlement. E.g., In re Silicone Gel Breast Implant Products Liability Litigation, 1994 WL 578353, at *18; see also South Carolina National Bank v. Sonte, 139 F.R.D. 335, 344 (D.S.C. 1991) (citing cases). Finally, given that the Trilateral Agreement likely would afford less money to claimants as a whole and the significant risk that it would afford no money to many claimants, it is likewise less advantageous to the third-party class.

87. Knowledgeable opinion favors the third-party settlement. Only a handful of objections have been received; The Court has considered them, and finds them to be without merit.

88. The Court accordingly concludes that the third-party settlement is fair, adequate and reasonable.

C. Notice

89. The notice given the third-party class was adequate and complies with due process.

Signed this 27th day of July, 1995.

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting by Designation

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated, Plaintiffs	:	Civil Action No. 6:93cv526
v.	:	
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,	:	
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:	
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:	

SUPPLEMENTAL CONCLUSIONS OF LAW

July 27, 1995

Based in part on the findings of fact entered in this case, the Court makes the following supplemental conclusions of law.[1]

I. CERTIFICATION OF THE GLOBAL HEALTH CLAIMANT CLASS AS A COUNTERCLAIM DEFENDANT CLASS

1. The requirements for certification of a defendant class are the same as the requirements for certification of a plaintiff class: Each of the requirements of Rule 23(a) and at least of the requirements of Rule 23(b) must be satisfied.

A. The requirements of Rule 23(a)

2. The Global Health Claimant Class (GHCC) is the same size whether it is a plaintiff or a defendant class. It satisfies the numerosity requirement as to the counterclaims for the same reasons that it satisfies the requirement as a plaintiff class. See Conclusions of Law at ¶ 15.

3. The GHCC members have an overriding common interest in eliminating the risk that they

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[1] To the extent the following supplemental conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings are hereby adopted by this Court.

face posed by the insurance coverage litigation. Findings of Fact at ¶¶ 4, 34, 54, 57, 225, 278, 346. The commonality requirement is, accordingly, satisfied.

4. In a defendant class action, typicality is shown if "the same event, practice, or course of conduct has given rise to the defense of the class members and their named representatives." In re Rusty Jones, Inc., 128 B.R. 1001, 1013 (N.D. Ill. 1991). The GHCC's representatives' defenses to the Insurers' and Fibreboard's counterclaims arise from the "same event[s], practice[s] and course[s] of conduct" as do those of the remainder of the Class. Findings of Fact at ¶ 288. The typicality requirement is satisfied.

5. The same class representatives and class counsel who represent the GHCC in connection with their claims against Fibreboard represent the GHCC as a defendant class against the counterclaims of the Insurers and Fibreboard. The adequacy of representation requirement is satisfied for the reasons set forth in the Conclusions of Law at ¶ 19-24.

B. The requirements of Rule 23(b)

6. Rule 23(b)(1)(A) provides for mandatory class certification where the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the Class would create a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . .

7. Prosecution of the counterclaims against individual members of the Class would create a "risk" of "inconsistent or varying adjudications" that would "establish incompatible standards of conduct" for the insurers and Fibreboard. Differing adjudications as to the validity and enforceability of the global settlement would impair the insurers' and Fibreboard's ability to pursue a uniform course of conduct with respect to Class members, and would subject them to conflicting instructions as to whether to order the escrow to turn over the settlement monies to the Trust and whether to consider and respond to future claims filed directly against them. See Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 901 (S.D.N.Y. 1975), aff'd, 556 F.2d 682 (2d Cir. 1977). Accordingly, the requirements of Rule 23(b)(1)(A) are satisfied.

8. The requirements of certification pursuant to Rule 23(b)(1)(B) are set forth in the Conclusions of law at ¶¶ 21-40.

9. The Insurers' and Fibreboard's counterclaims seek declarations approving the Global Settlement and enjoining separate actions by Class members. If those counterclaims were prosecuted separately as against individual Class members, there would be a risk that one or more adjudications would result disapproving the settlement

and permitting separate actions by Class members against Fibreboard and/or the insurers. Permitting any such separate actions by Class members would create a risk of substantial impairment within the meaning of Rule 23(b)(1)(B) to the remainder of the Class. Conclusions of Law at ¶ 35. Certification of the Class as a defendant class under Rule 23(b)(1)(B) is thus appropriate.

10. Rule 23(b)(2) provides for mandatory class certification where the Rule 23(a) prerequisites are met and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making ap-propriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." Many courts have certified defendant classes under Rule 23(b)(2). See, e.g., Marcera v. Chinlund, 595 F.2d 1231, 1238-39 (2d Cir.), judgment vacated on other grds, 442 U.S. 915 (1979), on remand, Marcera v. Chinlund, 91 F.R.D. 579 (W.D.N.Y. 1981) (certifying defendant class in 23(b)(2) action); Blake v. Arnett, 663 F.2d 906, 911-13 (9th Cir. 1981); Houston Chapter of the Int'l Ass'n of Black Professional Firefighters v. Houston, 1991 WL 340296, at *3, *28 (S.D. Tex. May 3, 1991); Thornton v. Butler, 728 F. Supp. 679, 681 & n.6 (M.D. Ala. 1990); United States v. Rainbow Family, 695 F. Supp. 314, 319-21 (E.D. Tex. 1988); Baker v. Wade, 553 F. Supp. 1121, 1125 n.1 (N.D. Tex. 1982), rev'd on other grounds, 769 F.2d 289 (5th Cir. 1984) (en banc), cert. denied, 478 U.S. 1022 (1986); Doss v. Long, 93 F.R.D. 112, 115, 119 (N.D. Ga. 1981).

11. The Insurers and Fibreboard have "acted . . . on grounds generally applicable to the class" by entering into proposed settlements that affect the rights of all members of the Class. "[F]inal injunctive relief [and] corresponding declaratory relief with respect to the class as a whole," in the form of a declaration that the settlement is fair, reasonable and adequate and injunctions regulating the resolution of future claims, is appropriate.

12. The Court therefore concludes that the GHCC should be certified for settlement purposes as a defendant class under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) with respect to Fibreboard's and the Insurers' counterclaims.

II. INTERPLEADER JURISDICTION

13. Title 28 U.S.C. § 1335, creates three requirements for certification of interpleader actions: (1) the action must be brought by a party with over $500 at stake; (2) there must be two or more adverse claimants to the money or property; and (3) the impleaded money or property, or a bond in the same amount, must be deposited with the Court. See 28 U.S.C. § 1335. The statute is "liberally construed" to effectuate its purpose, the protection of a stakeholder "from the possibility of multiple claims upon a single fund." In the Matter of Bohart, 743 F.2d 313, 324 (5th Cir. 1984); see also State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533 (1967) (same); Maryland Casualty Co. v. Glassell-Taylor & Rob-inson, 156 F.2d 519 (5th Cir. 1946); Lummis v. White, 629 F.2d 397, 399-400 & n.6 (5th Cir. 1980), rev'd on other grounds sub nom. Cory v. White, 457 U.S. 85 (1982).

14. Each of section 1335's requirements is satisfied here. Findings of Fact at ¶¶ 204, 278.

15. The Court rejects the Ortiz Intervenors contention that there can be no interpleader jurisdiction because "there is no true limited fund which could support interpleader certification." The Global Settlement created the fund that must be equitably distributed among class members (Conclusions of Law ¶ 38), and the invocation of interpleader is therefore permissible. Interpleaders have been used to effectuate mandatory class-action settlements. See, e.g., Bush v. Rewald, (1986-87 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D. Haw. Sept. 4, 1986); Grantham v. J.L. Mason Group, 811 F. Supp. 1386 (E.D. Mo. 1993).

16. Statutory interpleader also establishes personal jurisdiction over class members' claims against Fibreboard even though those claims were, prior to the settlement, in personam in character. Through the agreement of representative plaintiffs on behalf of all class members, the claims of plaintiffs are limited to the fund that has been established. Findings of Fact at ¶¶ 191-94, 260. Thus, the circumstance presented is that of a classic interpleader. See State Farm Fire & Casualty v. Tashire, 386 U.S. 523, 534 (1967).

Signed this 27th day of July, 1995

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting by Designation

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated,	:	Civil Action
Plaintiffs	: No.	
v.	:	6:93cv526
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION	:	
Defendants,	:	
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:	
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:	

JUDGMENT APPROVING GLOBAL SETTLEMENT

A Global Settlement Agreement was entered into as of December 23, 1993 by and among plaintiffs Gerald Ahearn, James Dennis and Charles W. Jeep (collectively "Representative Plaintiffs"), on behalf of themselves and the provisionally certified plaintiff class in the above-captioned

action (the "Settlement Class"), defendant Fibreboard Corporation and defendant-intervenors Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company. The Global Settlement Agreement was amended by the parties on December 21, 1994, February 6, 1995 and May 15, 1995 (the Global Settlement Agreement, as amended, will henceforth be referred to as the "Global Settlement Agreement"). A Defendant Class Settlement Agreement was entered into as of December 22, 1993 by and among the Representative Plaintiffs, on behalf of themselves and the Settlement Class, Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, and counterclaim defendant Owens-Illinois, Inc., on behalf of itself and the counterclaim defendant class subsequently provisionally certified in the above-captioned action (the "Global Third Party Claimant Class").

Following notice to the two affected classes, the Court held a hearing commencing on December 12, 1994 to consider whether the Global Settlement Agreement should be approved as fair, reasonable and adequate pursuant to Rule 23(e), Fed. R. Civ. P. Based on the evidence presented at the hearings, together with the papers and statements of counsel submitted by the parties in connection therewith, and the findings of fact and conclusions of law heretofore entered by the Court, the Court has determined that the Global Settlement Agreement is fair, reasonable and adequate and should be approved.

All capitalized terms not otherwise defined herein have the meanings set forth in the Glossary attached as Exhibit A hereto.

IT IS ORDERED, ADJUDGED AND DECREED, that:

I. The terms and provisions of the Global Settlement Agreement, including the releases and indemnities contained therein, are approved;

II. The Trust Agreement and the Trust Distribution Process incorporated in the Global Settlement Agreement are approved;

III. The parties shall implement the Global Settlement Agreement;

IV. The settlement reflected by the Global Settlement Agreement, with respect to both Class Member Claims and Third Party Claims, is fair, reasonable and adequate, and was entered into in good faith;

V. The Settlement Class Members and the Global Third Party Claimant Class Members have received adequate notice of the settlement contemplated by the Global Settlement Agreement, Rule 23 of the Federal Rules of Civil Procedure and the Constitution of the United States.

VI. The Settlement Class Members have been adequately, professionally and ethically represented by Class Counsel.

VII. All Class Member Claims, except for claims for punitive or exemplary damages, are directed to the Trust for disposition pursuant to the Trust Agreement and Trust Distribution Process;

VIII. As provided with specificity in the separate Judgment Approving Longshore Settlement, any settlement approved by the Court in this action is not and shall not be deemed to be a "settlement" or a "compromise" within the meaning of either Section 933(g)(1) or 933(g)(2) of the

Longshore and Harbor Workers' Compensation Act ("LHWCA") or Section 702.281 of Title 20 of the Code of Federal Regulations, nor is this Judgment Approving Global Settlement, the separate Judgment Approving Longshore Settlement and/or the separate Judgment Approving Agreement Regarding Plant Insulation Company a "judgment" under Section 933(g)(2) of the LHWCA with respect to any claim for which any member of the Settlement Class would otherwise be entitled to compensation under the LHWCA. Only individual settlements by, or awards on claims of, Settlement Class Members with or against the Trust shall trigger the notice, approval or forfeiture provisions of the LHWCA and other similar state and federal workers' compensation provisions.

IX. The Class Action, and all Class Member Claims (including all punitive and exemplary damage claims) against the Fibreboard, Continental and Pacific Releasees, are dismissed on the merits, without costs and with prejudice;

X. The provision contained in the Global Settlement Agreement whereby Fibreboard Corporation and the Insurers agree that the Insurers shall be discharged from any further obligation under or in connection with the Insurance Policies, except as an Insurer has specifically assumed under the Global Settlement Agreement or has preserved under the Settlement Agreement (and the related agreements referred to therein), is fair, reasonable and non-collusive;

XI. The Fibreboard, Continental and Pacific Releasees are discharged from any further liability with respect to any Class Member Claim or Third Party Claim;

XII. Fibreboard Corporation and its subsidiaries are permanently enjoined from asserting any and all claims of whatsoever description by Fibreboard Corporation and its subsidiaries, including bad faith claims, against (i) Continental

Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (ii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys; except that this injunction shall not extend to any claims arising out of the Global Settlement Agreement, the Settlement Agreement among Fibreboard Corporation, Continental Casualty Corporation, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company dated October 12, 1993 (or the related agreements referred to therein) or any obligation of the Settlement Class, Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company pursuant to an agreement or agreements entered into after December 23, 1993. Notwithstanding the foregoing exceptions, this injunction shall extend to any and all claims arising from paragraphs 1 and 2 of the April 9, 1993 agreement between Fibreboard Corporation and Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company (the "April 9 Agreement").

XIII. All Settlement Class Members[1]* are permanently enjoined from asserting against (i) any Fibreboard Releasee,[2] (ii) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (iii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys any Personal Injury Asbestos Claim of such Settlement Class Member, which is defined as:

(a) each and every claim, demand, action or suit of any kind for personal injury arising, directly or indirectly, from exposure to asbestos-containing products (including, without limitation, any direct action claim, wrongful death claim, punitive or exemplary damages claim, loss of consortium claim, fear of disease claim, bad faith claim, or surviving personal injury claim), and whether such injury manifested itself heretofore or here after, or (b) any claim, demand, action or suit of any kind arising, directly or indirectly, from any such claim, demand, action or suit referred to in (a) above (including without limitation any bad faith claim, contribution claim, indemnity claim, warranty claim, direct action claim or Additional Policy Claim [3]) against Fibreboard, against the Insurance Policies or against the Insurers (as those terms are defined in the preceding footnote) in any way predicated on obligations created by the Insurance Policies; provided, however, that a Personal Injury Asbestos claim shall not include any claim for benefits brought by an employee or his or her personal representative under any federal or state workers compensation statute (including, but not limited to, the United States Longshore and Harbor Workers Compensation Act and the Federal Employees Compensation Act), but shall include any subrogation, contribution or indemnity claim arising from such claim for benefits.

XIV. All Global Third Party Claimant Class Members[4] are permanently enjoined from asserting any Third Party Claim[5] against (i) any Fibreboard Releasee (as defined above), (ii) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (iii) Pacific Indemnity Company, its

parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys.

XV. The provisions set forth in the Global Settlement Agreement and the Trust Distribution Process for the resolution of Third Party Claims are approved and the terms and conditions of the Defendant Class Settlement Agreement are approved;

XVI. As provided with specificity in the separate Judgment Approving Agreement Regarding Plant Insulation Company, the agreement by and among the parties regarding Plant Insulation Company is approved.

XVII. The Court retains exclusive jurisdiction (a) to enforce the provisions of this judgment; (b) to resolve any disputes as to the performance or interpretation of the Global Settlement Agreement or this judgment; (c) to adjudicate any attempt by any person to challenge this judgment in any respect; and (d) over the maintenance, administration and distribution of the Trust and the funds contained therein, subject to and in accordance with the provisions of the Trust Agreement and Trust Distribution Process incorporated therein.

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[1]Settlement Class Members are:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure

with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

For purposes of this definition, a claim included within the terms of a settlement agreement (whether written, oral, or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which claim was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

[2] The "Fibreboard Releasees" mean the following entities, each of their respective predecessors, Subsidiaries, divisions, current and former attorneys, officers, directors and employees, and, with regard to Fibreboard Corporation's liability only, each of their respective successors in interest;

(a) Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and

(b) Louisiana Pacific Corporation (other than for asbestos-related claims against Louisiana-pacific which (a) state a basis for liability by Louisiana-Pacific wholly independent of any relationship between Louisiana-Pacific and Fibreboard Corporation or any act or omission in connection with such a relationship, and (b) as to which there is no basis for any claim against Fibreboard Corporation by the claimant or by Louisiana-Pacific.

3 "Additional Policy Claim" means each and every claim, de-mand, action or suit of any kind (i) which arises under, pursuant to or related to the Insurance Policies by any person or entity, whether directly or indirectly asserted against the Insurers or any third party, or arising under any term or terms or alleged coverage provided by the Insurance Policies and (ii) which arises directly or indirectly from personal injury resulting from exposure to asbestos or asbestos-containing materials for which Fibreboard may bear legal liability. For purposes of this definition: (a) "Insurance Policies" means policy number CLP 3197650 issued by Continental Casualty Company effective May 4, 1957, in favor of Fibreboard Corporation under its former name (Fibreboard Paper Products Corporation), policy number RD 951 90 81 issued by Continental Casualty Company, policy number RDU 975 65 87 issued by CNA Casualty Company of California and an endorsement thereto issued by Continental Casualty Company, policy number RDU 186 27 82 issued by Columbia Casualty Company, policy number RDU 186 30 62 issued by Columbia Casualty Company, policy number RDU 365 32 19 issued by Columbia Casualty Company, the policy that was alleged by Fibreboard Corporation to have been issued by Continental Casualty Company in the period 1954-56, and policy number LAC 88700 found to have been issued by Pacific Indemnity Company to Fibreboard Corporation effective May 4, 1956, and any other policies that were, or may be alleged to have been, issued to Fibreboard Corporation by any of the Insurers, including those set forth in the Pacific Indemnity Agreement; and (b) "Insurers" means (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and all insurance or indemnity companies controlling, controlled by or under common control with any of them or (ii) Pacific Indemnity Company and all insurance or indemnity companies controlling, controlled by or under common control with it.

4 Global Third Party Claimant Class Members are:

All individuals, corporations, partnerships or associations, whether or not incorporated, and any federal or local government or agency thereof, or any other entity and his, her or its legal representative, that have a Third Party Claim (as defined below). The fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment to the United States Constitution), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not Global Third Party Claimant Class Members.

5 Third Party Claims are any and all Personal Injury Asbestos Claims not held by Settlement Class Members (as those terms are defined above), except for the following:

(a) Settled Claims, which are defined as claims of indi viduals for asbestos-related personal injuries (i) that are not Personal Injury Asbestos Claims of Settlement Class Members and (ii) that as of August 27, 1993 had been settled (by Fibreboard Corporation or by Fibreboard Corporation and Continental) or were the subject of a verdict or judgment. For purposes of the definition of Settled Claims, a claim included within the terms of a settlement agreement (whether written, oral or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (A) an opt-out right with respect to that claim has been or is exercised, or (B) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993;

(b) Unsettled Claims, which are defined as claims of individuals for asbestos-related personal injuries brought against Fibreboard in lawsuits filed prior to August 27, 1993 and that are not Settled Claims. For purposes of this definition, "Unsettled Claims" shall include claims of persons who filed and for cash payment or some other negotiated value dismissed claims against Fibreboard and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; or

(c) any claims arising directly or indirectly from any Settled Claims or Unsettled Claims.

Dated:

CIRCUIT JUDGE ROBERT M. PARKER
CIRCUIT COURT JUDGE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
SITTING BY DESIGNATION

GLOSSARY

1. "Affiliate" of a Person means (i) a Subsidiary of such Person, (ii) a Person which owns, either alone or with or through one or more Affiliates, directly or indirectly, securities or other ownership interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions of such Person, and (iii) a Subsidiary of any Affiliate of such Person.

2. "Class Action" means Ahearn, et al. v. Fibreboard Corp., et al., 6:93 cv 526 (E.D. Tex), filed by the Representative Plaintiffs in the Global Court on behalf of themselves and the Settlement Class against Fibreboard Corporation on September 9, 1993.

3. "Class Counsel" means Joseph F. Rice and Joseph B. Cox, Jr., of the firm of Ness, Motley, Loadholt, Richardson & Poole, P.C.; Harry F. Wartnick, of the firm of Wartnick, Chaber, Harowitz, Smith & Tigerman; and Steven Kazan, of the firm of Kazan, McClain, Edises & Simon; or successors of the foregoing individuals.

4. "Class Member Claim" means any Personal Injury Asbestos Claim of a Settlement Class Member.

5. "Continental Releasees" means Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, Subsidiaries, Affiliates, directors, employees, officers, agents and attorneys.

6. "Fibreboard" means Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and each of their respective predecessors, Subsidiaries and divisions, and with regard to Fibreboard Corporation's liability only, each of their respective successors in interest.

7. "Pacific Indemnity Agreement" collectively means the Agreement and a Rescission of Insurance Policies, both dated March 27, 1992, between Fibreboard Corporation and Pacific Indemnity Company, pursuant to which Pacific and Fibreboard agreed to settle their insurance coverage dispute.

8. "Pacific Releasees" means Pacific Indemnity Company, its parents, Subsidiaries, Affiliates, directors, employees, officers, agents and attorneys.

9. "Person" means any individual, corporation, partnership or association, whether or not incorporated, and any federal, state or local government or agency thereof, or any other entity and his, her or its legal representative.

10. "Settlement Agreement" means the agreement among Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company dated as of October 12, 1993 pursuant to which they agreed, among other things, to settle and compromise all claims and potential claims against the Insurers under the Insurance Policies.

11. "Subsidiary" means, with respect to any Person, any corporation or other entity in which that Person owns, directly or indirectly, securities or other ownership interest having ordinary voting power to elect a majority of the board of directors or other Persons performing similar functions.

12. "Trust" means the trust referred to in Article V of the Global Settlement Agreement.

13. "Trust Agreement" means the Fibreboard Asbestos Compensation Trust Agreement among Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, Fibreboard Corporation and the Trustees attached as Exhibit B to the Global Settlement Agreement, as amended.

14. "Trust Distribution Process" means Annex A to the Trust Agreement, as amended.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated, Plaintiffs	: No.	: Civil Action
v.		: 6:93cv526
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,		
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.		
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.		

JUDGMENT REGARDING CLASS CERTIFICATION

All capitalized terms not otherwise defined herein have the meanings set forth in the Glossary attached as Exhibit A hereto.

IT IS ORDERED, ADJUDGED AND DECREED, that:

I. The following Settlement Class be certified, for settlement purposes only, as a mandatory, non-opt-out class under Rules 23(a) and 23(b)(1)(B) of the Federal Rules of Civil Procedure:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class

does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

For purposes of this class definition, a claim included within the terms of a settlement agreement (whether written, oral, or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement

agreement and which claim was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

II. The following Global Third Party Claimant Class is certified, for settlement purposes only, as a mandatory, non-opt-out defendant class under Rules 23(a), 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) under the Federal Rules of Civil Procedure:

All individuals, corporations, partnerships or associations, whether or not incorporated, and any federal or local government or agency thereof, or any other entity and his, her or its legal representative ("Persons"), that have a Third Party Claim, which is defined as any Personal Injury Asbestos Claim that is not a Class Member Claim, except for Settled Claims, Unsettled Claims or any claims arising directly or indirectly from any such Settled Claims or Unsettled Claims; provided, however, that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment to the United States Constitution), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not members of the Global Third Party Claimant Class.

Dated:

CIRCUIT JUDGE ROBERT M. PARKER
CIRCUIT COURT JUDGE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
SITTING BY DESIGNATION

GLOSSARY

1. "Additional Policy Claim" means each and every claim, demand, action or suit of any kind (i) which arises under, pursuant to or related to the Insurance Policies by any person or entity, whether directly or indirectly asserted against the Insurers or any third party, or arising under any term or terms or alleged coverage provided by the Insurance Policies and (ii) which arises directly or indirectly from personal injury resulting from exposure to asbestos or asbestos-containing materials for which Fibreboard may bear legal liability.

2. "Class Member Claim" means any Personal Injury Asbestos Claim of a Settlement Class Member.

3. "Fibreboard" means Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and each of their respective predecessors, Subsidiaries and divisions, and with regard to Fibreboard Corporation's liability only, each of their respective successors in interest.

4. "Insurance Policies" means policy number CLP 3197650 issued by Continental Casualty Company effective May 4, 1957, in favor of Fibreboard Corporation under its former name, Fibreboard Paper Products Corporation, policy number RD 951 90 81 issued by Continental Casualty Company, policy number RDU 975 65 87 issued by CNA Casualty Company of California and an endorsement thereto issued by Continental Casualty Company, policy number RDU 186 27 82

issued by Columbia Casualty Company, policy number RDU 186 30 62 issued by Columbia Casualty Company, policy number RDU 365 32 19 issued by Columbia Casualty Company, the policy that was alleged by Fibreboard Corporation to have been issued by Continental Casualty Company in the period 1954-1956, and policy number LAC 88700 found to have been issued by Pacific Indemnity Company to Fibreboard Corporation effective May 4, 1956, and any other policies that were, or may be alleged to have been, issued to Fibreboard Corporation by any of the Insurers, including those set forth in the Pacific Indemnity Agreement.

5. "Insurers" means (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and all insurance or indemnity companies controlling, controlled by or under common control with any of them and (ii) Pacific Indemnity Company and all insurance or indemnity companies controlling, controlled by or under common control with it.

6. "Personal Injury Asbestos Claim" means: (i) each and every claim, demand, action or suit of any kind for personal injury arising, directly or indirectly, from exposure to asbestos-containing products (including, without limitation, any direct action claim, wrongful death claim, punitive or exemplary damages claim, loss of consortium claim, fear of disease claim, bad faith claim, or surviving personal injury claim), and whether such injury manifested itself heretofore or hereafter, or (ii) any claim, demand, action or suit of any kind arising, directly or indirectly, from any such claim, demand, action or suit referred to in (i) above (including without limitation any bad faith claim, contribution claim, indemnity claim warranty claim, direct action claim or Additional Policy Claim) against Fibreboard, against the Insurance Policies or against the Insurers in any way predicated

on obligations created by the Insurance Policies; provided, however, that a Personal Injury Asbestos Claim shall not include any claim for benefits brought by an employee or his or her personal representative under any federal or state workers compensation statute (including, but not limited to, the United States Longshore and Harbor Workers' Compensation Act and the Federal Employee Compensation Act), but shall include any subrogation, contribution or indemnity claim arising from such claim for benefits.

7. "Settled Claims" mean claims of individuals for asbestos-related personal injuries (a) that are not Class Member Claims and (b) that as of August 27, 1993 had been settled (by Fibreboard Corporation or by Fibreboard Corporation and Continental) or were the subject of a verdict or judgment.

For the purpose of this definition, a claim included within the terms of a settlement agreement (whether written, oral or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out right with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

8. "Unsettled Claims" shall mean claims of individuals for asbestos-related personal injuries brought against Fibreboard in lawsuits filed prior to August 27, 1993 and that are not Settled Claims. For purposes of this definition, "Unsettled Claims" shall include claims of persons who filed and

for cash payment or some other negotiated value dismissed claims against Fibreboard and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, ET AL.	§	
	§	
V.	§	CIVIL ACTION
NO. 6:93cv526		
	§	
FIBREBOARD CORPORATION,	§	
ET AL.	§	

JUDGMENT ON ATTORNEYS' FEES

In accordance with the Magistrate Judge's Reports and Recommendations and the Court's Orders of August 18, 1995 and August 29, 1995, the Court

Enters Judgment in favor of Joseph F. Rice and Joseph B. Cox, Jr. of the firm Ness Motley Loadholt and Richardson against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount off $16,461,391.20 for attorney fees and $ 456,806.57 for expenses.

Enters Judgment in favor of Steven Kazan of the firm Kazan McClaim Edises & Simon, against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $9,236,515.20 for attorneys fees and $217,729.84 for expenses.

Enters Judgment in favor of Harry F. Wartnick of the firm Wartnick, Chaber, Harowitz, Smith and Tigerman, against

Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $6,855,302.40 for attorneys' fees and $296,658.07 for expenses.

Enters Judgment in favor of Elihu Inselbuch of the firm Caplin and Drysdale, against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $11,179,504.80 for attorney fees and $251,547.62 for expenses.

Enters Judgment in favor of R. Bruce Shaw of the firm Nelson Mullins Riley and Scarborough, L.L.P., counsel for class representative Owens-Illinois, against the settlement Trust in the amount of $108,563.23 for attorneys' fees and expenses.

Enters Judgment in favor of Richard Josephson and George Shipley of the firm Baker and Botts, counsel for class representative Owens-Illinois, against the settlement Trust in the amount of $186,022.00 for attorneys' fees and $16,818.00 for expenses.

Enters Judgment in favor of Clinton A. Krislov, of the firm Krislov and Associates and Ronald W. Lipton of the firm Stinson, Lupton and Weiss, P.A., counsel for the Longshore Intervenors against the settlement Trust in the amount of $474,954.40 for attorneys' fees and $25,257.56 for expenses.

This Judgment is contingent upon the settlement agreement in *Ahearn v. Fibreboard Corp.*, civil action number 6:93cv526 receiving final judicial approval, and upon any agreement between class counsel.

SIGNED this _____ day of August, 1995.

ROBERT M. PARKER
UNITED STATES CIRCUIT JUDGE
United States Court of Appeals
for the Fifth Circuit
Sitting by Designation

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and	§
CHARLES W. JEEP, On Behalf of	§
Themselves and Others	§
Similarly Situated	§
	§
Plaintiffs,	§
	§
v.	§
	§
FIBREBOARD CORPORATION	§
	§
Defendant	§
	§
CONTINENTAL CASUALTY COMPANY	§
and	§
PACIFIC INDEMNITY COMPANY	§
	§
Intervenors	§

ORDER PROVISIONALLY CERTIFYING CLASS FOR SETTLEMENT PURPOSES

On September 9th, 1993, plaintiffs and intervenors, Continental Casualty Company and Pacific Indemnity Company ("Intervenors"), submitted to this Court a joint motion for provisional certification, for settlement purposes only, that this

action may be maintained as a class action, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, on behalf of a class consisting of certain future claimants. Based on the class action complaint, the answer and counterclaims of Intervenors, the affidavits of Joseph B. Cox, Jr., Meyer G. Koplow, and Roger M. Trangsrud (and accompanying exhibits), the memorandum of law submitted therewith, and all prior proceedings in this Court, the Court finds that the requested provisional class certification is authorized by Rule 23 of the Federal Rules of Civil Procedure, that the provisional certification will facilitate proceedings in connection with a settlement heretofore agreed upon by the parties to this action and that certification of the proposed class pursuant to Rule 23(b)(1)(B) is appropriate.

IT IS THEREFORE ORDERED that this action is hereby provisionally certified, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, for settlement purposes only, as a class action on behalf of a class consisting of:

(a) all persons (or their legal representatives) who have been exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, filed a lawsuit or settled a claim for asbestos-related personal injury, or damage, or death in any court against Fibreboard or against persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) all persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the

exposure of a spouse, household member, or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) all past, present and future spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability).

IT IS FURTHER ORDERED that plaintiffs Gerald Ahern, James Dennis, and Charles W. Jeep are designated as representatives of the class, and that Joseph F. Rice, Joseph B. Cox, Jr., Steven Kazan, Harry F. Wartnick and Robert E. Sweeney are designated as counsel for the class. The law firm of Caplin & Drysdale, Chartered is designated as counsel to the class counsel.

IT IS FURTHER ORDERED that any person wishing to be heard with respect to the provisional class certification ordered herein, or to the final certification of a class of any kind in this matter, will have an opportunity to do so before this Court at the hearing to be held upon the fairness of the settlement.

IT IS FURTHER ORDERED that this provisional certification shall be subject to further Order of the Court.

SIGNED this the 9th day of September, 1993.

_____

ROBERT M. PARKER, CHIEF JUDGE

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-40635

In re:
ASBESTOS LITIGATION

JAMES FLANAGAN, et al.,

Appellants,

VERSUS

GERALD AHEARN, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion July 26, 1996,
5 Cir., 90 F.3d 963)

(Order Filed Nov. 26, 1996)

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The court having been polled at the request of one of its members and a majority of the judges who are in regular

*Judges King, Higginbotham, Barksdale, Benavides, and Parker are recused and did not participate in the consideration of the suggestions for rehearing en banc. Judge Dennis also did not participate.

active service not having voted in favor (FRAP 35 and Local Rule 35), the suggestions for rehearing en banc are DENIED.

JERRY E. SMITH, Circuit Judge, with whom GARWOOD, JOLLY, JONES, EMILIO M. GARZA, and DeMOSS, Circuit Judges, join, dissenting:

I respectfully dissent from the failure of the court to grant rehearing en banc. The result of this litigation, as implemented by the district court and affirmed by the panel majority, is the first no-opt-out, mass-tort, settlement-only, futures only class action ever attempted or approved. The issues presented are worthy of consideration beyond the level of circuit panel review.

Five of the active judges are disqualified from participating in this matter, and a sixth judge has elected not to participate in the consideration of the suggesting for rehearing en banc. Accordingly, it is not possible to determine whether, if all active judges were voting, a majority would decide to rehear this case en banc.

The applicable statute and rules require the affirmative vote of a majority of the active judges--here, nine of the seventeen active judges--for en banc consideration, as recused and non-participating judges are counted as members of the court for purposes of the calculation.[1] The effect in this case is

---

[1] "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." 5th Cir. R. 35.6. Under 28 U.S.C. § 46(c), rehearing en banc is "ordered by a majority of the circuit judges of the circuit who are in regular active service." *See* Fed. R. App. P. 35(a); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5 (1963); *Western P.R.R. v. Western P.R.R.*, 345 U.S. 247, 250 (1953); *Variable Annuity Life Ins. Co. v. Clark[e]*, 998 F.2d 1295 (5th Cir. 1993), *suggestion for rehearing en banc* (continued...)

to require not a simple majority, but a supermajority of 82%--nine of the eleven participating judges--to favor reconsideration.

That onerous requirement has not been met. Accordingly, the appellants' only recourse, in order to obtain review of the difficult and novel issues presented, is to petition the Supreme Court for writ of certiorari.

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[1](...continued)
denied, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J. dissenting), *rev'd sub nom. NationsBank v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995).

APPENDIX L

No. 95-40635

In re:
ASBESTOS LITIGATION

JAMES FLANAGAN, et al.,
Appellants,

VERSUS

GERALD AHEARN, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

(Order Filed Dec. 3, 1996)

ON SUGGESTION FOR PANEL REHEARING

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The application for panel rehearing is DENIED.

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX M

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

U.S. CONST. ART. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

U.S. CONST. AMEND. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

RULES ENABLING ACT — 28 U.S.C. § 2072(b):

> Such rules shall not abridge, enlarge or modify any substantive right.

RULES OF DECISION ACT — 28 U.S.C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

FED. R. CIV. P. 23:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of . . .
>
> > **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially

impair or impede their ability to protect their interests. . . .

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHERN, JAMES DENNIS, and CHARLES W. JEEP, On Behalf of Themselves and Others Similarly Situated	§	Civil Action No. 6:96CV526
Plaintiffs,	§	
v.	§	
FIBREBOARD CORPORATION	§	
Defendant	§	

CLASS ACTION COMPLAINT

Plaintiffs Gerald Ahern, James Dennis, and Charles W. Jeep, on behalf of themselves and others similarly situated, as and for their class action complaint against Defendant Fibreboard Corporation ("Fibreboard"), allege upon knowledge as to themselves and otherwise upon information and belief as follows:

Jurisdiction

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1332. Plaintiffs allege an amount in controversy in excess of $50,000.00, exclusive of Interest and costs, for each of the individual members of the Class.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(2).

Parties

Plaintiffs

3. Plaintiff Gerald Ahern is a resident of South Carolina. Plaintiff Ahern worked on board U. S. Navy ships at the Charleston Air Force Base and at the Charleston Naval Shipyard, Charleston, South Carolina, from the 1940's through the late 1980's. In the course of his employment he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. As a direct and proximate result of his exposure to asbestos or asbestos-containing products, plaintiff Ahern contracted asbestosis. Plaintiff Ahern has not previously filed a lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

4. Plaintiff James Dennis is a resident of South Carolina. Plaintiff Dennis worked as a pipefitter from 1974 to 1988. In the course of his employment, he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. Plaintiff Dennis has not yet been diagnosed as having an asbestos-related condition. However, as a direct and proximate result of his exposure to asbestos or asbestos-containing products, he has an increased risk of developing a number of malignant and nonmalignant asbestos-related conditions. Plaintiff Dennis has not previously filed a

lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

5. Plaintiff Charles W. Jeep is a resident of Missouri. Plaintiff Jeep worked at the Puget Sound Naval Shipyard in the state of Washington from 1944 until 1946. In the course of his employment he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. As a direct and proximate result of his exposure to asbestos or asbestos-containing products, plaintiff Jeep contracted mesothelioma. Plaintiff Jeep has not previously filed a lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

Defendant

6. Defendant Fibreboard is a corporation organized under the laws of Delaware, with its principal place of business in California. Fibreboard is qualified to do, and does, business in Texas.

7. Fibreboard has also done business under the following names: Fibreboard Paper Products Corporation; Fibreboard Products (Eastern Division), Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation. "Defendant" or "Fibreboard" includes each of the above listed entities and each of their respective predecessors and successors in interest, and their respective subsidiary companies and divisions.

Class Action Allegations

The Class

8. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(b)(1)(B) on behalf of themselves and a class of persons similarly situated.

9. The Plaintiff class (the "Class") is defined as follows:

A. All persons (or their legal representatives) who have been exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), to asbestos or asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, filed a lawsuit or settled a claim for asbestos-related personal injury, or damage, or death in any court against Fibreboard or against persons or entities for whose actions or omissions Fibreboard bears legal liability.

B. All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided,

however, that the Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignance.

C. All past, present and future spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability).

Requirements of Rule 23(a)

10. Numerosity. The Class is sufficiently numerous that joinder of all members is impracticable. Class members likely number in excess of one hundred and fifty thousand.

11. Commonality. Questions of law and fact are common to the Class, including: "state of the art" defense; strict liability; negligence; successor liability; health hazards of asbestos; when Fibreboard became aware or should have become aware of any health risks associated with the use of asbestos products; the steps, if any, taken to lessen those risks; failure to warn; adequacy of warnings; continued availability of punitive damages; the availability of insurance coverage; the appropriate allocation of Fibreboard's assets; and others.

12. Typicality. Claims of the class representatives typify those of the Class generally. All Class members share an interest in reducing litigation costs, maximizing the funds available for recovery, and ensuring the availability of insurance proceeds. These interests predominate over any issues affecting individual Class members.

13. Adequacy of Representation. Named Plaintiffs will fairly and adequately protect the interests of Class members. The interests of the named Plaintiffs are coincident with, and not antagonistic to, those of other members of the Class. In addition, Plaintiffs are represented by experienced and able counsel specifically appointed by this Court to negotiate a settlement and who have previously litigated numerous personal injury cases involving asbestos exposure and the injuries which may arise from such exposure.

Requirements of Rule 23(b)(1)(B)

14. This action is properly maintained as a Class action under Rule 23(b)(1)(B). For the reasons set forth in Paragraphs 15 through 26, the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to certain individual Class members which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications or which would substantially impair or impede the other Class members' ability to protect their interests, as alleged hereafter.

15. In the past fifteen years, tens of thousands of individuals exposed to asbestos or asbestos-containing products have filed lawsuits in the state and federal courts against Fibreboard and other asbestos manufacturers alleging injury and wrongful death.

16. More than 45,000 asbestos-related injury and wrongful death cases are still pending against Fibreboard.

17. Absent a settlement of Plaintiffs' claims, it is expected that over one hundred and fifty thousand additional asbestos-related cases will be filed against Fibreboard and other parties in future years.

18. Fibreboard's assets are so limited in relation to the pending and potential claims against Fibreboard that Fibreboard cannot pay, absent insurance proceeds, all future asbestos-related claims. Recovery by earlier litigants will likely exhaust Fibreboard's available and projected assets, and would, as practical matter, substantially impair the ability of later claimants to obtain relief.

19. Fibreboard contends that Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") must indemnify Fibreboard against its liability for asbestos-related injury claims, pursuant to insurance policies issued by those companies in the 1950's. Pacific provided coverage during 1956 and 1957, and Continental provided coverage from 1957 to 1959.

20. Fibreboard has vigorously litigated its right to indemnity. In In re Asbestos Insurance Coverage Cases, (Included Action: Fireman's Fund v. Fibreboard Corporation, et al.) (Judicial Council Coordination Proceeding No. 1072), Superior Court of the State of California, City and County of San Francisco, Judge Ira Brown rendered judgment in favor of Fibreboard, in one of the most sweeping asbestos insurance coverage rulings to date. Judge Brown ruled that Continental and Pacific must indemnify Fibreboard in full for all liability to any claimant first exposed to asbestos any time prior to or

during their respective policy periods, even if that claimant did not manifest any disease until years later. That judgment is currently on appeal in the California Court of Appeal.

21. Both Continental and Pacific continue to deny coverage under the policies.

22. Absent indemnification from Continental or Pacific, Fibreboard is likely to be rendered insolvent by pending asbestos litigations, and unable to compensate Class members for asbestos-related injuries.

23. Even if Fibreboard ultimately prevails on appeal and obtains indemnity for claimants first exposed to asbestos prior to 1959, Fibreboard still would face financial uncertainty because of liability to individuals first exposed to asbestos after 1959. Fbreboard has entered into an agreement with Pacific that could provide funds for these individuals, but availability of these funds under that agreement is subject to challenge by Continental. Moreover, judgments for punitive damages in many jurisdictions would not be covered by the Continental or Pacific policies.

24. Unless Fibreboard settles its coverage disputes in a manner that ensures indemnification for asbestos claimants against Fibreboard, there is a substantial risk that Fibreboard will be rendered insolvent and asbestos claimants against Fibreboard will be left with no relief whatsoever.

The Proposed Settlement

25. In light of Fibreboard's limited assets, the unresolved issue of insurance coverage, and the expense of duplicative and protracted litigation, there is substantial risk that

adjudications with respect to individual Class members' claims will, as a practical matter, be dispositive of the claims and interests of other similarly situated Class members, or will substantially impair or impede the ability of Class members with unadjudicated claims to protect their interests.

26. On August 27, 1993, Fibreboard, Continental, Pacific, and negotiating counsel appointed by this Court to represent a "futures class" reached an agreement in principle, a proposed settlement, whereby Continental and Pacific have agreed to provide funds in excess of $1.5 billion to create a trust to compensate future asbestos claimants. In addition, Fibreboard has agreed to make an additional contribution to fund later years of the settlement trust. Those funds will provide a fair mechanism for settlement of the Class members' claims.

LIABILITY ALLEGATIONS

COUNT I: Negligent Failure to Warn

27. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 26 above.

28. Fibreboard, during all the times relevant hereto, caused asbestos-containing products to be placed in the stream of commerce with the result that all Plaintiffs and their decedents, and those similarly situated, were exposed, occupationally, paraoccupationally or through the exposure of a spouse or household member to asbestos fibers and dust emitted by those products.

29. As the proximate result of exposure to and the inhalation of asbestos fibers and dust of asbestos-containing

products, Plaintiffs and their decedents, and those similarly situated, have suffered or have an increased risk of developing injuries, including cellular changes in their lungs and other organs; diminished ability of their bodies to resist asbestos-related conditions; contraction of asbestos-related conditions, including, but not limited to, pleural thickening, pleural plaques, asbestosis, respiratory and other cancers, and mesothelioma; and enhanced risk of contracting such conditions in the future; emotional distress arising out of asbestos-related conditions or the fear of future asbestos-related conditions, and the necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions. As a proximate result of these injuries, Plaintiffs, their decedents, and those similarly situated to them, or some of them, have suffered further losses and injuries, such as lost wages, past and future medical expenses, funeral and burial expenses, loss of support, loss of consortium, pain and suffering, emotional distress, loss of life's pleasures, and loss of society.

30. During all times relevant hereto, Fibreboard knew or should have known of the dangers that exposure to its asbestos-containing products could cause conditions such as pleural thickening, pleural plaques, asbestosis, respiratory and other cancers, and mesothelioma in all Plaintiffs and their decedents, and those similarly situated to them.

31. During all times relevant hereto, Fibreboard failed to take reasonable steps to provide all Plaintiffs, their decedents, and those similarly situated to them, (a) adequate warnings of the known or potential dangers from exposure to its asbestos or asbestos-containing products and (b) adequate instructions on how to safely use its asbestos or asbestos-containing products so as to reduce the risk of asbestos-related conditions. The failure by Fibreboard to provide such warnings

and instructions constitutes negligence and proximately caused the injuries or potential injuries to Plaintiffs, their decedents, and those similarly situated to them as described above.

32. The failure of Fibreboard to provide Plaintiffs and those similarly situated to them with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products so as to reduce the danger was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

COUNT II: Strict Liability

33. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 32 above.

34. The asbestos-containing products manufactured, produced, marketed, or sold by Fibreboard were defective and unreasonably dangerous to human health (a) because they were sold without any warnings or adequate warnings as to their dangers and without adequate instructions on how to use the products to as to reduce those dangers, or (b) because Fibreboard failed to develop alternative products with safer designs even though such products were feasible. Those defects were the proximate cause of the injuries to Plaintiffs and those similarly situated to them, as described in Count I.

35. The manufacture, production, marketing, and sale by Fibreboard of asbestos-containing products was reckless, wanton and willful and in conscious disregard of the safety and health of Plaintiffs and those similarly situated to them.

COUNT III: Breach of Express and Implied Warranty

36. Plaintiffs incorporate herein by reference their allegation in Paragraphs 1 through 35, above.

37. Fibreboard has breached express, as well as implied, warranties of good and merchantable quality and fitness for intended use with respect to its asbestos-containing products.

38. The breach of those warranties has proximately caused injury to Plaintiffs and those similarly situated to them, as described in Count I.

COUNT IV: Concert of Action and Conspiracy

39. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 38 above.

40. During all relevant times herein, Fibreboard acted in concert and as part of a conspiracy with other parties to withhold adequate warnings of the known and potential dangers from exposure to asbestos or asbestos-containing products.

41. As a result of this concert of action and conspiracy, Plaintiffs have suffered or have an increased risk of suffering injuries.

COUNT V: All Other Viable Claims

42. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 41, above.

43. Plaintiffs allege and assert that each and every recognized claim or cause of action against Fibreboard arising

from or related to exposure of asbestos-containing products, and claim all relief, legal or equitable, available to them.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant plaintiffs and the other members of the class the following relief:

A. General and special compensatory damages determined to have been sustained by each of them respectively;

B. Punitive damages from Fibreboard in an amount to be determined;

C. The costs of this suit;

D. Appropriate declarations and orders; and

E. Other relief as may be deemed just and proper.

DATED: September 9, 1993

Respectfully submitted,

Joseph F. Rice

Joseph B. Cox, Jr.

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
151 Meeting Street, Suite 600
P. O. Box 1137
Charleston, SC 29402
(803) 577-6747

Steven Kazan
KAZAN, MCCLAIN,
EDISES & SIMON
171 Twelfth Street, Suite 300
Oakland, CA 94607
(501) 465-7728

Harry F. Wartnick
CARTWRIGHT,
VOKELMAN,
BOROWSKY,
WARTNICK, MOORE
& HARRIS, INC.
101 California Street,
Suite 2600
San Francisco, CA 94111
(415) 433-0440

Robert E. Sweeney
ROBERT E. SWEENEY CO., I.P.A.
Suite 1500, Illuminating Building
55 Public Square
Cleveland, OH 44113
(216) 696-0606

ATTORNEYS FOR PLAINTIFFS AND THE PROPOSED CLASS

Elihu Inselbuch
Peter Van N. Lockwood
James E. Sottile, IV
CAPLIN & DRYSDALE, CHARTERED
399 Park Avenue
New York, NY 10022
(212) 319-7125

OF COUNSEL TO THE ATTORNEYS FOR PLAINTIFFS AND THE PROPOSED CLASS

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and	§
CHARLES W. JEEP, On Behalf of	§
Themselves and Others	§
Similarly Situated	§
	§
Plaintiffs,	§
	§
v.	§
	§
FIBREBOARD CORPORATION	§
	§
Defendant	§
	§
CONTINENTAL CASUALTY COMPANY	§
	§
and	§
	§
PACIFIC INDEMNITY COMPANY	§
	§
Applicants for Intervention	§

MOTION FOR LEAVE TO INTERVENE BY CONTINENTAL CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

COME NOW Continental Casualty Company and Pacific Indemnity Company ("Intervenors") and move for leave to intervene in this action in order to assert the defenses and claims as set forth in their proposed pleading, a copy of which is attached to this motion, and, in support of the motion, would respectfully state as follows:

1. Intervenors are the parties identified in the Plaintiffs' Complaint who allegedly indemnify the Defendant, Fibreboard Corporation, for any liability for asbestos-related injuries, pursuant to insurance policies issued in the 1950's as construed in certain coverage litigation involving those policies entitled In re Asbestos Insurance Coverage Included Action: Fireman's Fund v. Fibreboard Corporation, etal.) (Judicial Council Coordination Proceeding No. 1072), Superior Court of State of California, City and County of San Francisco, J. Brown presiding). As such,

Intervenors have an interest relating to the property and/or transaction which is the subject matter of the above-entitled action.

2. The proposed pleading of the Intervenors asserts defenses and claims regarding Plaintiffs' Complaint which have not yet been presented by the defendant and their interest in the proceedings will not and cannot be adequately represented by the present parties.

3. Intervenors are so situated that the disposition of this action may as a practical matter impair or impede Intervenors' ability to protect their interests.

4. Intervenors have defenses and claims relating to the Plaintiffs' Complaint raising questions of law or fact which are common to the main action.

5. Intervenors assert that to allow such intervention will not result in undue delay to the original parties to the proceeding.

6. Attached to this motion is the Intervenors' pleading setting forth the defenses and claims for which intervention is sought.

WHEREFORE, Continental Casualty Company and Pacific Indemnity Company respectfully pray that they be granted leave by this Court to intervene in the above-referenced action and for such other and further relief as may be deemed just and proper.

Dated: September 9, 1993 Respectfully submitted,

Otis Carroll
Bill Parker
IRELAND et al.P.C.
6101 S. Broadway
Tyler, Texas 75703
(903) 561-1600

Herbert M. Wachtell
William C. Sterling, Jr.
David Gruenstein
Jeffrey R. Boffa
WACHTELL, LIPTON
ROSEN & KATZ
299 Park Avenue
New York, New York 11071
(212) 371-9200

By:_____
HERBERT M. WACHTELL

Rodney L. Eshleman
Donald T. Ramsey
CARROLL, BURDICK
44 Montgomery Street, Suite 400
San Francisco, California 94104
(415) 989-5900

Stuart Philip Ross
Sean M. Hanifin
ROSS, DIXON
601 Penn. Ave., N.W.
North Building
Washington, D.C. 20008
(202) 662-2000

ATTORNEYS FOR INTERVENOR
CONTINENTAL CASUALTY COMPANY

Paul J. Bschorr
Richard B. Sypher
Glenn M. Kurtz
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

By:_____
RICHARD B. SYPHER

ATTORNEYS FOR INTERVENOR
PACIFIC INDEMNITY COMPANY

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and	§
CHARLES W. JEEP, On Behalf of	§
Themselves and Others	§
Similarly Situated	§
	§
Plaintiffs,	§
	§
v.	§
	§
FIBREBOARD CORPORATION	§
	§
Defendant	§
	§
CONTINENTAL CASUALTY COMPANY	§
and	§
PACIFIC INDEMNITY COMPANY	§
	§
Applicants for Intervention	§

JOINT MOTION FOR PROVISIONAL CLASS CERTIFICATION

Upon the accompanying class action complaint, the affidavits of Meyer G. Koplow, Roger M. Trangsrud and Joseph

B. Cox, Jr. (and the exhibits attached thereto), and the accompanying memorandum of law, and the grounds set forth therein, named class representatives Gerald Ahern, James Dennis, and Charles W. Jeep, and intervenors Continental Casualty Company and Pacific Indemnity Company, hereby jointly move for an order, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, for provisional certification of a class, as defined in Paragraph 9 of the Complaint in the above-captioned action, for purposed of settlement only, and for such other and further relief as the Court may deem just and proper.

Dated: September 9, 1993

Respectfully submitted,

Joseph F. Rice
Joseph B. Cox, Jr.
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
P.O. Box 1137
Charleston, S.C. 29402
(803) 577-6747

Mr. Stephen Kazan
KAZAN, McCLAIN, et al.
171 Twelfth Street, Suite 300
Oakland, California 94607
(510) 465-7728

Mr. Harry F. Wartnick
101 California St.
Suite 2600
San Francisco, CA
94111
(415) 433-0440

Robert E. Sweeney
ROBERT E. SWEENEY CO., L.P.A.
Suite 1500, Illuminating Building
55 Public Square
Cleveland, OH 44113
(216) 696-0606

ATTORNEYS FOR PLAINTIFFS
AND THE PROPOSED CLASS

Elihu Inselbuch
Peter Van N. Lockwood
James E. Sottile, IV
CAPLIN & DRYSDALE, CHARTERED
399 Park Avenue
New York, New York 10022
New York, NY 10036
OF COUNSEL TO THE ATTORNEYS FOR PLAINTIFFS
AND THE PROPOSED CLASS

Otis Carroll
Bill Parker
IRELAND, et al. P.C.
6101 S. Broadway, Suite 500
Tyler, Texas 75703
(903) 561-1600

Herbert M. Wachtell
William C. Sterling, Jr.
David Gruenstein
Jeffrey R. Boffa
WACHTELL, LIPTON,
ROSEN & KATZ
299 Park Avenue

New York, New York
10171
(212) 371-9200

By:_____
HERBERT M. WACHTELL

Rodney L. Eshleman
Donald T. Ramsey
CARROLL, BURDICK et al.
44 Montgomery Street, Suite 400
San Francisco, California 94104
(415) 989-5900

Stuart Philip Ross
Sean M. Hanifin
ROSS, DIXON et al.
601 Penn. Ave., N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

ATTORNEYS FOR INTERVENOR
CONTINENTAL CASUALTY COMPANY

John H. Minton
Michael E. Jones
POTTER, MINTON, ROBERTS,
DAVIS & JONES, P.C.
P. O. Box 359
Tyler, Texas 75710
(903) 597-8311

Paul J. Bschorr
Richard B. Sypher
Glenn M. Kurtz
WHITE & CASE
1155 Ave of the Americas
NY, NY 10036
(212) 819-8200

By:_____
RICHARD B. SYPHER

ATTORNEYS FOR INTERVENOR
PACIFIC INDEMNITY COMPANY

APPENDIX Q

Excerpts from Testimony of
Fibreboard Counsel Stephen Snyder
Page 143, Line 14

MR. MILLER: Thank you, Your Honor.

Q. At the time Fibreboard entered into the Asbestos Claims Facility, could you explain how it viewed the need to control filings of new cases, et cetera, and how that was affected its thinking?

A. Fibreboard was settling policies to get into the facility, and it still had policies in -- in process in the coverage litigation. I believe that many defendants saw the Asbestos Claims Facility as a surrogate for Johns-Manville, a big powerful organization that they could belong to that would control something that seemed to be starting to get out of control. So what Fibreboard looked for mainly when it went into the facility, I believe, at that time was a chance to exercise some influence on dockets, to do something about the number of cases that were coming on the dockets where there didn't seem to be any disease, and to keep the defense costs and the values within reasonable limits. And it was -- it was going to be through the bargaining ability of the facility to settle cases on large numbers of defendants -- for large numbers of defendants that the facility hopefully would be able to exercise that control and keep the litigation within rein.

Q. At the time Fibreboard entered the facility, would you explain the corporate goal which was described by some

in opening statements with respect to managing and resolving the asbestos litigation?

A. It had been Fibreboard's corporate goal for some time to manage and resolve its asbestos liabilities within its available insurance resources. That was a principle that was etched onto the forehead of every asbestos lawyer that worked for Fibreboard and had been for years. Fibreboard was spending, for a company of its size, and enormous resources out of its cash, because it had to pay lawyers to prosecute its coverage litigation, and the goal that it had in mind was this deliverance that it would get if it was successful.

APPENDIX R

Excerpts from Testimony of
CNA Counsel Meyer Koplow
Page 1557, Line 1

Q. I want to turn to another brief subject, Mr. Koplow, that has to do with the legal ethics area. You are aware that one of the objectors has presented testimony, at least in deposition, and will present testimony here with respect to legal ethics issues? Are you aware of that, sir?

A. Yes, I am.

Q. In addressing one area that was discussed with that expert, did there ever come a time that CNA on its own behalf or Continental and Pacific together determined that there was one cap amount of money available to be split between the presents and future claimants?

A. No, I don't think it would be fair to say that there was a time when the insurers concluded there was one capped amount of money.

Q. So there was no direct competition at any time between so-called present claimants or future claimants for individual dollars that were available from the insurers, is that correct?

MR. BARON: Your Honor, I object to that one. I don't believe he's laid a foundation for it.

THE COURT: Overruled.

A. With the caveat that there was obviously some overall cost to the insurers that they ultimately would conclude they weren't prepared to exceed, I did not view the present claimants and the future claimants as being in direct competition.

MR. INSELBUCH:

Q. Indeed, as you sit here today, you do not know what the sum total of the expenses for the insurers will be; isn't that correct?

A. Unhappily, that is correct.

Q. And neither does Mr. Bschorr, isn't that correct?

A. I'd be shocked if Mr. Bschorr had better information on this than we did.

Q. Are you of a view one way or the other whether the plaintiffs' class of future claimants would have been better served had they been represented by lawyers, competent, able, hard-working lawyers who had no other involvement in asbestos cases rather than lawyers who indeed had involvement, even current involvement, in asbestos cases?

A. While I have no empirical data to support my view, I am confident that had we been dealing with counsel that did not have both the experience and leverage that this counsel had, that we would have been able to negotiate a deal that would have been less expensive to the insurers.

Q. Finally, I think you forgot one of the assets that does come into the trust. Do you recall under the global settlement agreement, if and when it is approved, that Fibreboard also was to assign to the trust any claims for contribution it might have that result from any and all present claims?

A. I -- I had forgotten that. That is correct, that's one of the trust assets.

MR. INSELBUCH: That's all I have, Your Honor.

APPENDIX S

Excerpts from Testimony of
Class Counsel Harry Wartnick
Page 684, Line 21

Q. Now, Mr. Wartnick, do you know one way or the other whether a trilateral or bilateral agreement would have been reached but for the conclusion of global settlement talks?

A. I don't know that.

Q. Okay. You can't testify one way or the other on that one, can you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. I wouldn't. I certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process, that is correct.

Q. Okay. In other words, but for an agreement with Fibreboard, you would not have participated in a class action litigation against them; is that right?

A. I had no intention to file a litigated class action against them throughout this process, that is correct.

Q. All right. Now, in the event, however likely, that the global is disapproved by either this court or by another court, do you contemplate that this case will be dismissed?

A. I believe that applications will be made to the court to dismiss this action by Fibreboard and others. Whether it's actually dismissed is up to the court.

Q. Will you contest those motions to dismiss?

THE COURT: What does that have to do with any decision this court has to make?

MR. BARON: Mr. Wartnick knows. Your Honor, it goes to Article III, Section 2 of the Constitution, the power of this court at all to prosecute this case, if indeed this is a case.

THE COURT: The court has some passing familiarity with Article III. I see no relevance whatsoever to that line of questioning. Go ahead.

APPENDIX T

TRUST DISTRIBUTION PROCESS

Annex A to the Trust Agreement

This Trust Distribution Process creates the procedures for submitting, processing and paying Class Member Claims and Third-Party Claims. Capitalized terms used in this Trust Distribution Process are defined herein or in the Glossary.

A. Overview

The primary goal of the Trust is fair and equitable treatment for all Beneficiaries consistent with Trust resources. This Trust Distribution Process furthers that goal by establishing procedures that are intended to process and evaluate Class Member Claims of Beneficiaries impartially, pay all Class Member Claims over time, and maintain reasonable reserves for any Class Member Claims in excess of projections. The Trustees shall implement and administer this Trust Distribution Process in accordance with their duties under the Trust Agreement.

The claims resolution process begins with a proof of claim. The Trust then makes a determination whether the claim meets the criteria for any of the five Scheduled Diseases: Mesothelioma, Lung Cancer, Other Cancer, Asbestos Lung Disease I ("ALD-1") and Asbestos lung Disease II ("ALD-2"). If the claim meets the criteria for a Scheduled Disease, it will be evaluated based on factors that have significance in the resolution of similar claims by settlement or trial, including but not limited to the factors set forth in Schedule A hereto. If the

claim does not meet the criteria for one of the Scheduled Diseases, the Trust will evaluate whether it nonetheless asserts a compensable claim for an asbestos-related injury.

After evaluation, the Trust will make a good faith settlement offer or advise the Beneficiary of the reasons for rejecting the claim. The Beneficiary may either accept or reject the offer or negotiate further with the Trust. If the Beneficiary rejects the Trust's offer, he or she may submit supplemental information to the Trust and have his or her claim reevaluated by the Trust and/or negotiate further with the Trust. If negotiation with the Trust fails, the Beneficiary shall, if he or she wishes to pursue the claim, proceed to mediation and then to binding or nonbinding arbitration. Beneficiaries may bring an action against the Trust in the tort system only after they have participated in good faith in both mediation and nonbinding arbitration and have rejected the award in a nonbinding arbitration.

Beneficiaries must also appear at a mandatory settlement conference under the auspices of the Court before proceeding to the tort system. If a Beneficiary rejects settlement following the settlement conference, he or she may elect immediate binding arbitration or exit to the tort system. No punitive damages, pre-judgment or post-judgment interest, damages for risk of cancer, or compensatory damages beyond Fibreboard's own share will be allowable in the tort system. Judgments may be collected only as provided in this Trust Distribution Process.

Similar claims-handling procedures (described in Section H below) apply to certain Third-Party Claims including those of Defendant Class Members who succeed to Class Member Claims.

Class Member Claims and Third-Party Claims will be eligible for payment once they are Liquidated, whether by settlement, arbitration, or judgment. Judgments or claims settled after exit to the tort system will normally be paid out over a five-year period, while claims resolved without resort to the tort system will normally be paid over a three-year period. Total payments from the Trust in each year for Trust Expenses, Class Member Claims and Third-Party Claims are limited to the amounts set forth in Section E. While the Trust is expected to be able to pay all claims as Liquidated yearly, if amounts available are insufficient to make all payments due on Liquidated claims in any year, claims for Mesothelioma and Lung Cancer will be paid first, then Other Cancer and ALD-1 claims, then ALD-2 claims, and then Residual Claims, whether any such claims have been Liquidated by settlement, arbitration or judgment. Within each of those categories, claims will be paid in the order of the date on which a release is received by the Trust (for settled claims), an arbitration ruling is rendered (for claims resolved through arbitration) or a judgment becomes final (for claims resolved in the tort system). Class Member Claims and Third Party Claims which cannot be paid because the amount available for that year is insufficient to make all payments due on such claims will be deferred for payment (FIFO within their payment categories) until the following year.

B. The Claim Procedure

1. **Submitting a Claim**. Other than Interim Claims submitted pursuant to Article 7 of the Global Settlement Agreement, commencing on February 14, 1994, any Beneficiary may submit a claim to the Trust. To do so, the Beneficiary shall

provide to the Trust, on forms approved by the Trustees and the SCB, a proof of claim including at least the following information concerning the Exposed Person: name, address, social security number, date of birth, date of death (if applicable), marital status and number and age of dependents, spouse's name and social security number, occupation, smoking history, year of first exposure to any asbestos or asbestos-containing products, identification and source of identification of asbestos-containing products manufactured or supplied by Fibreboard to which the Exposed Person was exposed, the work sites where the Exposed Person was exposed to asbestos or to Fibreboard asbestos, the years of such exposures including specific descriptive comments concerning the duration and intensity of such exposure, the status of related workers compensation or civil litigation regarding asbestos exposure, and the Scheduled Disease, if any, for which the Beneficiary believes the claim qualifies or a statement of the disease or injury the Beneficiary asserts he or she has if he or she does not believe he or she qualifies for a Scheduled Disease. In addition, the Beneficiary shall provide the Trust with a Medical Report, a PFT Report and a B-reader Report, and, in Malignancy Claims, a pathology report (where available).

2. **Expedited Review Option.** The Trust may establish a process for expedited review of ALD-2 claims by persons desiring an accelerated settlement of their claim at a fixed amount ("Expedited Review Claims"). A Beneficiary seeking such expedited review shall submit an abbreviated proof of claim for expedited review by the Trust. The abbreviated proof of claim shall provide the following information concerning the Exposed Person: name, address, social security number, date of birth, date of death (if applicable), marital status, spouse's name and social security number, occupation, the Scheduled Disease for which the Beneficiary believes the

claim qualifies, the work sites where the Exposed Person was exposed to asbestos or to Fibreboard asbestos and such information requested by the Trust that adequately demonstrates exposure to asbestos or asbestos-containing products and to Fibreboard asbestos or asbestos-containing products. In addition, the Beneficiary shall supply the Trust with a Medical Report. The Trust will expeditiously review the abbreviated proof of claim and may, but is not required to, offer to settle such Expedited Review Claims for a single fixed cash payment of an amount and on a time schedule established from time to time by the Trust. If the Trust determines not to offer to settle an Expedited Review claim, the Beneficiary may submit a proof of claim as set forth in Section B.1.

The Trust may establish additional categories of Expedited Review Claims with differing fixed cash payments and differing information requirements. In addition, the Trust may eliminate or suspend the Expedited Review Claim option for one or more categories of Class Member Claims if it determines that such option is encouraging the filing of claims that would not otherwise be eligible for payment under these procedures or is using a disproportionate share of the Trust's assets.

3. **Ordering of Claims for Processing.** Claims shall be ordered for processing by the Trust in the manner described in this Section. As a general practice, the Trust shall review its claims files on a regular basis and notify all Beneficiaries whose claims are likely to be processed in the near future. A Beneficiary's position in the FIFO queue for processing will be determined by the date of receipt by the Trust of a properly completed proof of claim form, and among claims received the same day, by the date of diagnosis of the disease on which the claim is based. Where the Beneficiary has filed an

incomplete proof of claim, the Trust shall notify the Beneficiary of the need for additional information and shall not process the claim until the file is complete. A Beneficiary shall not receive a position in the FIFO processing queue until his or her proof of claim is properly completed.

4. **Initial Evaluation of Claims.** As a proof of claim is reached in the FIFO queue, the Trust shall evaluate it to determine whether the claim qualifies as one of the five Scheduled Diseases. A Beneficiary's right to assert a valid claim for an asbestos-related injury or disease is in no way prejudiced by failure of his or her asbestos-related injury or disease to qualify as one of the Scheduled Diseases. If a Scheduled Disease is determined to exist, the Trust shall evaluate the Beneficiary's claim using factors relevant to the resolution of asbestos claims for that Scheduled Disease by settlement or trial, including the factors set forth in Schedule A hereto. If the Trust concludes that the Beneficiary's injury or disease does not meet the criteria for a Scheduled Disease, it shall determine whether the Beneficiary nonetheless asserts a meritorious claim for an asbestos-related injury or disease and shall evaluate the claim using factors relevant to the resolution of similar claims by settlement or trial. If the Trust accepts for disposition a claim with respect to a disease which is not a Scheduled Disease, the Trust shall place it in a Schedule Category based on which Scheduled Disease it most closely resembles.

In addition to the medical evidence which Beneficiaries are required to submit with the initial proof of claim or submit as part of any supplemental information she has submitted to the Trust all medical reports relating to any alleged asbestos-related condition other than those subject to attorney work product privilege. If the Beneficiary submits supplemental information to the Trust, the Trust shall reevaluate the claim and

either make a written good faith settlement offer or reject the claim. The Beneficiary shall then reject or accept any offer based on reevaluation using the procedures outlined above for rejection or acceptance of the Trust's initial offer. If the Beneficiary rejects such offer, he or she may elect to negotiate further with the Trust or shall proceed to mediation.

6. **Second (Malignant) Injury Claims.** The Trust shall offer to settle Non-Malignancy Claims on two alternative bases: 1) in exchange for a general release; or 2) in exchange for a limited release covering all asbestos-related personal injury claims other than subsequent Malignancy Claims. The Trust's settlement offer for a limited release shall be the amount of its offer for the general release minus the lesser of: 1) half of its settlement offer for the general release; and 2) $1,750. If a Beneficiary accepts the Trust's offer of a limited release, the Trust shall account for the monetary difference between its settlement offer for the general release and its settlement offer for the limited release in a separate account. A Second Injury Claim shall be ordered in the FIFO queue for processing based upon the date of receipt by the Trust of the Second Injury Claim, and shall be treated as a new claim under this Trust Distribution Process.

7. **Audit Procedures.** In all cases, the Trust may require that medical x-rays, tests, laboratory examinations and other medical evidence comply with recognized medical standards regarding equipment, testing methods, and procedures to assure that such evidence is reliable. The Trust may develop methods for auditing the reliability of all data submitted in support of claims, including product identification and medical evidence, and may require independent interpretation of CT scans, X-rays, pathology specimens or other physical evidence. If its audits show an unacceptable level of reliability for evidence

submitted from specific individuals or institutions, the Trust may refuse to accept evidence from them. In addition, the Trust may develop methods for auditing other types of evidence necessary to support a claim.

8. **Exigent Health and Extreme Hardship Claims.** Notwithstanding the FIFO order processing rules described in Sections B.2 through B.4, the Trust may process and Liquidate Extreme Hardship Claims and Exigent Health Claims at any time.

The Trust shall establish procedures to expedite its processing, evaluation and negotiation of Exigent Health Claims and Extreme Hardship Claims as well as the ADR procedures the Beneficiary asserting such a claim shall be required to follow under Section C. Such expedited procedures shall be designed to allow all Exigent Health Claims to be Liquidated within six months of presentation of a properly completed proof of claim to the Trust, and to ensure, to the maximum extent practicable, that in jurisdictions in which Beneficiaries can obtain accelerated trial dates for Exigent Health Claims, the Trust's negotiation process and the ADR procedures can be completed before a trial of an Exigent Health claimant's case against Defendant Class Members.

If the Trust determines, in its sole discretion, that a Beneficiary asserting an Extreme Hardship Claim needs greater financial assistance than would be afforded by the payout scheme set forth in Section F.3, the Trust may accelerate payment to the Beneficiary of part or all of the amount for which that claim has been Liquidated as the Trust deems appropriate. Payments with respect to Exigent Health Claims shall be made only in accordance with the payout scheme set forth in Section F.3.

9. **Withdrawal of Claims.** If the Beneficiary does not respond to the Trust's offer on initial evaluation or reevaluation within 30 days, the Trust's offer and the claim shall be deemed to be withdrawn without prejudice unless the Beneficiary has requested in writing one or more extensions of time, not to exceed six months in the aggregate, within which to respond to the offer. If the Beneficiary still has not responded to the Trust's offer at the end of the extension period, the Trust's offer and the claim shall then be deemed to be withdrawn without prejudice. A Beneficiary may also elect to withdraw a claim at any time without prejudice. A claim that is withdrawn or deemed to have been withdrawn may be resubmitted at any time, and shall be reordered in the FIFO queue for processing based on the date of receipt by the Trust of a properly completed proof of claim with respect to the refiled claim.

C. **ADR Procedures.**

1. **Mediation.** If the Beneficiary chooses not to submit supplemental information or rejects the Trust's offer based on its evaluation of such supplemental information and elects not to negotiate further with the Trust, the Beneficiary's claim shall be referred to mediation. The Trust shall establish and maintain a list of Qualified Mediators, compensated by the Trust. The Trust shall refer claims to Qualified Mediators from the list in rotation as soon as practicable after being notified by the claimant that he wishes to proceed to mediation.

Claims shall be handled by each mediator in the order received by him or her, to the extent practicable. Any party may be represented by legal counsel. The mediator shall confer with the parties and/or their legal representatives, individually and jointly. Such conference may be in person or by telephone, at the claimant's election. The Beneficiary and a

representative of the Trust with settlement authority must personally participate in the conference unless, in the judgment of the mediator, the Beneficiary's physical aor psychological condition precludes such participation. Such conference shall be in the nature of a settlement conference. The mediator shall review the claim and the positions of the parties, the prior negotiations between the parties, the offer(s) and demand(s), such information as the parties may wish to submit as to a fair and equitable settlement, and all documents and medical reports relevant to the claim. At least five days prior to the mediation conference, Beneficiary and the Trust shall each submit to a mediator a concise, confidential statement outlining the Beneficiary's medical condition, exposure to Fibreboard's products and each party's position on settlement value. The mediator shall work with both sides toward reaching an acceptable, reasonable settlement. The mediator does not have the authority to impose a settlement on the parties.

2. **Arbitration.** If the Beneficiary is unable to settle his or her claim with the Trust within 30 days of the mediation conference, the Beneficiary shall, if he or she wishes to pursue the claim, proceed to arbitration of the claim. The arbitration shall be commenced by a written demand for arbitration by the Beneficiary served on the Trust within 45 days of the mediation conference. Such arbitration shall be binding or nonbinding at the election of the Beneficiary, which election must be made in the Beneficiary's written demand for arbitration. The Trust and the Beneficiary shall bear their own fees and costs, except that the Trust shall pay the administrative fees and costs of conducting the arbitration unless the arbitrator in his or her sole discretion assesses such administrative fees and costs against any Beneficiary for delaying or abusing the arbitration procedures.

The Trust shall maintain a list of Qualified Arbitrators. Arbitrations shall be conducted by a single Qualified Arbitrator. The Beneficiary and the Trust shall attempt to agree on a Qualified Arbitrator who will preferably, but not necessarily, be selected from the list maintained by the Trust. If the parties cannot agree on a Qualified Arbitrator, a Qualified Arbitrator shall be selected pursuant to procedures of an independent arbitration facility to be selected by the Trust or by such other procedures as may be adopted by the Trust. The parties shall provide the Qualified Arbitrator and each other with copies of all relevant materials concerning the claim and any supplementary information they wish the Qualified Arbitrator to consider not less than 30 days prior to the date of the arbitration hearing. The Qualified Arbitrator may require the parties to submit such additional information as he or she deems necessary. The Qualified Arbitrator shall conduct a hearing on the claim at which testimony may be offered, unless both parties agree to waive such hearing. In nonbinding arbitrations, the Beneficiary must attend the hearing in person, unless in the judgment of the Qualified Arbitrator his or her physical or psychological condition makes such attendance impossible. The Qualified Arbitrator shall issue an award promptly but in no event later than 120 days from the date on which he or she receives the last submission of information from either of the parties relevant to the claim, unless the parties agree to extend such time. The Award shall be based on the same factors used by the Trust in evaluating claims.

If the Beneficiary elected binding arbitration at the time of the demand, neither party shall have the right to appeal the award other than on grounds set forth in the Federal Arbitration Act. If the Beneficiary elected nonbinding arbitration at the time of the demand, the award shall become final and binding if the Beneficiary does not reject the award by

so notifying the Trust in writing within 30 days after receipt of the award. If the Beneficiary does not reject the award as provided above, he or she shall be deemed to have accepted it. If the Beneficiary rejects the award, the award shall not be binding on either party and the Beneficiary may proceed to the tort system under the procedures set forth below.

3. **Location for ADR Procedures.** The Trust shall establish procedures to conduct mediations and arbitrations at scheduled intervals at such locations around the United States as the Trust determines will be convenient to the largest numbers of claimants and will not impose undue burden on the Trust.

D. Litigation.

A Beneficiary may not proceed to litigate his or her claim against the Trust in the tort system unless he or she has in good faith: (1) submitted a proof of claim and rejected the resulting settlement offer from the Trust; (2) participated in a mediation conference and failed to settle his or her claim; (3) participated in nonbinding arbitration and rejected the resulting arbitration award; and (4) participated in a mandatory settlement conference as described below. The following procedures shall govern any Beneficiary who elects to litigate in the tort system his or her claim against the Trust.

1. **Mandatory Settlement Conference.** Before any Beneficiary may proceed to the tort system, the Beneficiary must request the Court to conduct a mandatory settlement conference with respect to the claim. This mandatory settlement conference may be conducted by the Court, or by another judge or a neutral special master designated by the Court, or, if both the Beneficiary and the Trust agree, by a mutually selected,

neutral third party other than the Court (the "Settlement Conference Designee"). The settlement conference may be conducted by telephone unless the Court or the Settlement Conference Designee determines, on application by the Trust or the Beneficiary, that the conference should be conducted in person. If the Court or the Settlement Conference Designee so determines, the settlement conference must be attended in person by the Beneficiary, unless in the judgment of the Court or the Settlement Conference Designee his or her physical or psychological condition makes such attendance impossible, and by a representative of the Trust with settlement authority at such location as the Court or the Settlement Conference Designee shall determine. If no settlement is reached within 30 days of the mandatory settlement conference, the Beneficiary and the Trust shall submit to each other on that date a written settlement offer that will remain in effect for an additional 30 days. If neither party accepts the other party's settlement offer during this period, then the Beneficiary may, upon certification from the Court or the Settlement Conference Designee that the Beneficiary has completed the settlement conference process and otherwise has complied with the requirements of the preceding paragraph of this Section D, commence a lawsuit against the Trust in the tort system or elect binding arbitration.

2. **Procedural Rules.**

a. Any Beneficiary who elects binding arbitration following the mandatory settlement conference shall follow the procedures set forth in Section C.2 above. Payment of any resulting award shall, however, be governed by Section F of this Trust Distribution Process.

b. Any Beneficiary who elects to resolve a claim through the tort system may pursue the claim in any appropriate forum, subject to the procedures set forth herein. Payment of any resulting judgment shall, however, be governed by Section F of this Trust Distribution Process.

c. The Trust may assert any and all defenses available to it or which would have been available to any Trustor against which the claim could have been asserted absent Global Approval Judgment with respect to Beneficiaries who elect to resolve their claims through the tort system.

d. In no event shall a Beneficiary be permitted to seek or recover from the Trust in a lawsuit in the tort system any punitive or exemplary damages of any sort. Nor may any claimant seek or recover compensatory damages in excess of Fibreboard's actual share of responsibility or for the actual percentage risk of contracting cancer. Finally, no Beneficiary may seek or recover pre-judgment interest in a suit in the tort system. Any other damages available under the applicable law shall remain recoverable except as provided in Section D.2.e below.

e. In no event shall the Trust or any other Person be required to post a bond to stay collection of a judgment in the tort system. Judgments shall be paid by the Trust in the order set forth in Section F below, and no Beneficiary shall be permitted to take any steps to collect a judgment from the Trust except as set forth in this Trust Distribution Process. The Trust shall not be responsible to pay post-judgment interest; in lieu thereof, the procedures set forth in the last sentence of Section F.1 shall apply.

f. (i) The death of a Beneficiary after he or she has filed a proof of claim with the Trust shall not eliminate compensable elements of his or her claim accruing prior to the date of death, by, for example, eliminating any claim for damages for pain and suffering occurring prior to the date of death or by creating an offset to a lost earnings award for personal consumption occurring prior to the date of death, notwithstanding applicable state law to the contrary. (ii) However, such compensable elements may not be recovered after exit to the tort system unless the Beneficiary shows that he or she could have recovered such damages absent compliance with the requirements of the Trust Distribution Process.

g. At trial the defendant shall be the Trust and the Trust and Beneficiary shall jointly request that the Trust be introduced to the trier of fact (judge or jury as the case may be) in the following fashion or in another substantially similar fashion as the trial court may direct, in addition to any other evidence permitted by the Court about the Trust's identity, goals and operations:

> Members of the jury, this is an action for damages for [personal injury/wrongful death] brought by plaintiff[s] against [various defendants, including] the Fibreboard Asbestos Compensation Trust. The Fibreboard Asbestos Compensation Trust was created by Order of a United States District Court to provide fair and equitable treatment for persons with asbestos injury for which Fibreboard Corporation might bear legal liability. The Trust has a fixed amount of money with which to compensate all persons with an asbestos injury to whom Fibreboard is found to be legally liable. This sum of money must cover all victims, past and future. Under no circumstances may you award any sum designed or

intended to punish or make an example of Fibreboard or the Trust. If you should find that Fibreboard or products manufactured by Fibreboard were a legal cause of injury to plaintiff[s], any payment of damages awarded with respect to Fibreboard's products will be made by the Trust, not by Fibreboard itself. The fact that a trust exists is in no way an indication that you should impose any liability on the Trust. No sum you might award will be paid by either Fibreboard or by insurance; any award will be paid only by the Trust.

h. Any Beneficiary who elects to resolve a claim through the tort system shall provide the Trust (without cost to the Trust) with copies of all pleadings, discovery materials, evaluations, and other similar nonprivileged documentation requested by the Trust in connection with its defense of the claim in the tort system, so that the Trust may efficiently and economically prepare for trial.

E. Funds for Payment of Claims.

As set forth in the Trust Agreement, the Trust shall administer three funds, for payment of Trust Expenses, Class Member Claims and Third Party Claims, to be known as "Fund I," "Fund II," and "Fund III." Fund I is primarily intended to pay expenses of, and claims against, the Trust during the first 25 years after Global Approval Judgment. Fund II is primarily intended to pay expenses of, and claims against, the Trust commencing 26 years after Global Approval Judgment, although it is available to pay expenses and claims commencing 21 years after Global Approval Judgment, if Fund I is insufficient for that purpose. Fund III is primarily intended to pay any expenses and claims not paid from Fund I or Fund II, commencing 46 years after Global Approval Judgment, although

it is available to pay expenses and claims commencing 41 years after Global Approval Judgment if Fund II is exhausted prior to 46 years after Global Approval Judgment.

In order to assure that, to the maximum extent feasible, Trust resources are preserved and fairly allocated among all Beneficiaries (i.e., those who will have claims in the future as well as those who have claims now) Appendix 1 describes in detail how Trust surpluses realized in any Fiscal Year are to be preserved and limits amounts that can be spent in any Fiscal Year to pay claims from Funds I, II or III. In general, Appendix 1 specifies that payments for Trust Expenses, Class Member Claims and Third Party Claims may not exceed annual earnings on the assets within the relevant Fund plus a portion of the remaining principal (calculated by allocating remaining Fund principal equally over the years remaining in the Fund then in use). If any Surplus remains after payment of all Trust Expenses, Class Member Claims and Third Party Claims and certain indemnity expenses for a Fiscal Year (and after restoration of any increases in Principal Amount used in prior years as described below), such Surplus will either increase the Reserve Accunt or build Trust principal. This Reserve Account will be used to pay expenses of claims for any later year before Trustees may access any Increased Principal Amount to be used in that year. If, however, in any of the Fiscal Years 3 through 12 or 16 through 20 after Global Approval Judgment, the Earnings Amount and Principal Amount together with the funds contained in the Reserve Account in excess of $10,000,000 are not sufficient to pay Trust Expenses and to make all payments with respect to Class Member Claims or Third Party Claims for the first two Schedule Categories that are due or all payments with respect to Class Member Claims or Third Party Claims for the third Schedule Category that were due and unpaid on four consecutive prior Distribution Dates, the Trust may increase the

usable portion of the Fund principal by up to 25% for any of Fiscal Years 3 through 12 after Global Approval Judgment or 12.5% for any of the Fiscal Years 16 through 20 after Global Approval Judgment.

1. **Fund I.**

a. **Commencement of Payments.** The Trust shall not pay any Class Member Claim or Third Party Claim (other than Extreme Hardship Claims and Expedited Review Claims) from Fund I until the Distribution Date first occurring after the end of the first Fiscal Year after Global Approval Judgment.

b. **Distributable Amount.** Total payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund I for any Fiscal Year (i.e., payments for Trust Expenses, Extreme Hardship Claims and Expedited Review Claims made during that Fiscal Year, together with payments for Class Member Claims and Third Party Claims for that Fiscal Year made on the Distribution Date immediately following that Fiscal Year) (other than any payments made from the Reserve Account) shall not exceed the Distributable Amount for that Fiscal Year. For the first Fiscal Year after Global Approval Judgment the Earnings Amount for Fund I shall be calculated from the date of Global Approval Judgment.

c. **Distribution of Remaining Balance.** The transfer from Fund I to Fund II of any remaining balance in Fund I shall occur on the earlier of (i) the day after the Distribution Date for the twenty-fifth Fiscal Year after Global Approval Judgment, or (ii) the day before the Distribution Date for the first Fiscal Year occurring after the twentieth Fiscal Year after Global Approval Judgment in which the maximum possible

Distributable Amount is less than the Earnings Amount and the Principal Amount that were in effect for Fund I for the twentieth Fiscal Year after Global Approval Judgment, the Trust shall transfer such remaining balance and the remaining balance of the Reserve Account to Fund II, at which time payments out of Fund II shall commence as provided in Section E.2.

2. **Fund II.**

a, **Commencement of Payments.** No payments shall be made from Fund II until the Distribution Date for the twenty-first Fiscal Year after Global Approval Judgment. If at that time Fund I still has money left to pay Trust Expenses, Class Member Claims or Third Party Claims, no payments shall be made from Fund II until the earlier of: (1) the day after the Distribution Date for the twenty-fifth Fiscal Year after Global Approval Judgment; or (2) the Fiscal Year in which the Distribution Date referred to in Section E.1.c.(ii) occurs.

b. **Distributable Amount.** The total amount of payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund II for any Fiscal Year is limited to the Distributable Amount for that Fiscal Year.

c. **Distribution of Remaining Balance.** The transfer from Fund II to Fund III of any remaining balance in Fund II shall occur on (i) the day after the Distribution Date for the twentieth Fiscal Year after the transfer of the balance in Fund I to Fund II pursuant to Section E.1.c., or (ii) such later date as the Trustees determine would be in the best interests of all Beneficiaries, both present and future (but in no event later than the day after the Distribution Date for the forty-fifth Fiscal Year after Global Approval Judgment); at which time payments out of Fund III shall commence as provided in Section E.3.

3. **Fund III.**

a. **Commencement of Payments.** No payments shall be made from Fund III until the Distribution Date for the forty-first Fiscal Year after Global Approval Judgment. If at that time Fund II still has money left to pay Trust Expenses, Class Member Claims or Third Party Claims, no payments shall be made from Fund III until the date Fund II is exhausted or the balance of Fund II has been transferred into Fund III pursuant to Section E.2.c.

b. **Distributable Amount.** The total amount of payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund III for any Fiscal Year is limited to the Distributable Amount for that Fiscal Year.

c. **Distribution of Remaining Balance.** If there is a remaining balance in Fund III on the day after the Distribution Date for the sixty-first Fiscal Year after Global Approval Judgment, and there are then, or are anticipated by the Trustees to be in the future, any Trust Expenses, Class Member Claims, Third Party Claims and other obligations of the Trust which have not yet been liquidated and/or fully paid, the Trust shall use the remaining balance of Fund III to pay such Trust Expenses, Class Member Claims, Third Party Claims and other obligations of the Trust. Upon the occurrence of the Termination Date, the Trust shall apply any remaining balance of Fund III to such charitable purposes as the Trustees in their reasonable discretion, after consultation with the SCB, shall determine, which charitable purposes, if practicable, shall be related to occupational health.

4. **Determination of Distributable Amount for Each Fund.** Within 90 days following the end of each Fiscal Year after Global Approval Judgment, the Trust shall determine the Distributable Amount for such Fiscal Year, which Distributable Amount (after payment of Trust Expenses, Extreme Hardship Claims and Expedited Review Claims for such Fiscal Year) shall be distributed to pay Class Member Claims and Third Party Claims, in the order set forth in Section F.2, on a date, no later than 120 days following the end of each such Fiscal Year, chosen by the Trust (the "Distribution Date").

F. Order, Timing and Limitations on Payments of Claims.

1. **Eligibility for Payment.** All Class Member Claims and Third Party Claims become eligible to begin receiving payments from the Trust on the Distribution Date immediately following the Fiscal Year in which such Class Member Claims or Third Party Claims are Liquidated, provided that in the case of settled Class Member Claims the Trust has received the release required by Section B.4. Judgments obtained in the tort system shall be eligible for payment in the same order as Claims Liquidated by settlement or arbitration, except as provided in Section F.3.b, and shall be treated as having been Liquidated on the date the claimant obtains a final, nonappealable judgment, except that upon an unsuccessful appeal by the Trust, the date of Liquidation shall be the date of the trial court judgment.

2. **Order of Payment.** On each Distribution Date, the Trust shall make pay-ments on Liquidated Class Member Claims and Third Party Claims in the following order: (1) claims for Mesothelioma and Lung Cancer; (2) claims for Other Cancer and Asbestos Lung Disease I; (3) the first payment on claims for Asbestos Lung Disease II which was due and unpaid

on four or more consecutive prior Distribution Dates, (4) the second payment on claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates; (5) the third payment for claims on Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates; (6) any other payments on claims for Asbestos Lung Disease II; and (7) Residual Claims. While it is anticipated that the Trust will be able to pay all Liquidated Class Member Claims and Third Party Claims on each Distribution Date, all payments due on Liquidated claims for Mesothelioma and Lung Cancer must be made before any payments due on Liquidated claims for Asbestos Lung Disease I and Other Cancer may be made, all payments due on Liquidated claims for Asbestos Lung Disease I and Other Cancer must be made before any payments due on Liquidated claims for Asbestos Lung Disease II may be made, the first payment on Liquidated claims for Asbestos Lung Disease II which was due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II may be made, the second payment on Liquidated claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II may be made, the third payment on Liquidated claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II and all other payments due on Liquidated claims for Asbestos Lung Disease II must be made before any payments due on Liquidated Residual Claims may be made. Within each of the seven categories, payments due on Class Member Claims and Third Party Claims shall be made in FIFO order based on

when the Class Member Claims and Third Party Claims were Liquidated, whether by settlement, arbitration or judgment, except that settled Class Member Claims shall be ordered within each such category according to when the release required by Section B.4 is received by the Trust. Other than by virtue of subrogation to a Class Member Claim pursuant to Section H.5.a, no contribution claim brought by a Defendant Class Member shall be paid inasmuch as resolution of a Class Member Claim against the Trust gives rise to a right of set-off or reduction under Section H.1.a of the Trust Distribution Process sufficient to satisfy, and bar the assertion of, any such contribution claim against the Trust.

3. **Terms of Payment.**

a. **Claims Resolved Outside the Tort System.** Class Member Claims resolved without filing an action against the Trust in the tort system and all Third Party Claims shall be eligible for payment over a three-year period, 40% due on the Distribution Date immediately following the Fiscal Year in which such claim was Liquidated and 30% due on each of the next two Distribution Dates, except for Expedited Review Claims paid pursuant to Section B.2 and Extreme Hardship Claims paid pursuant to Section B.8 of this Trust Distribution Process.

b. **Claims Resolved in the Tort System.**

(i) Class Member Claims resolved after the filing of an action against the Trust in the tort system shall be eligible for payment on the following schedule. On the Distribution Date following the Fiscal Year in which such a claim was Liquidated, the Beneficiary shall be eligible to receive the lesser of: (1) 100% of the last settlement offer made by the

Trust before the Beneficiary filed an action against the Trust in the tort system, or 100% of the proposed Award in nonbinding arbitration with the Trust pursuant to Section C, whichever is greater; and (2) 40% of the amount of the judgment or settlement after the action was filed. The remaining balance of the judgment or settlement shall be eligible for payment on the Distribution Dates following the next four Fiscal Years in equal installments so long as each such installment does not exceed $50,000. In the even that each such installment would exceed $50,000, the Beneficiary shall be eligible to receive $50,000 per year until the Class Member Claims is fully paid. In the event that any resulting judgment is less than the proposed Award in nonbinding arbitration with the Trust pursuant to Section C, the Trust shall be entitled to recover as a cost of litigation and deduct from the judgment its cost of mediation and arbitration pursuant to the procedures set forth in Section C.

(ii) Notwithstanding the foregoing, in order to prevent evasion or abuse of the ADR provisions of this Trust Distribution Process, to conserve the assets of the Trust for the benefit of all Beneficiaries, and to manage prudently the cash flow of the Trust in a manner consistent with Section E of this Trust Distribution Process, the Trustees shall have the discretion, in any instance in which the Beneficiaries' judgments against the Trust result from a trial of the claims of more than 15 such Beneficiaries, to pay such judgments in such manner and over such a longer time period (not to exceed 10 years) as the Trustees shall determine is in the best interests of the Trust and of all Beneficiaries.

4. **Deferral of Payments.** All Class Member Claims or Third Party Claims eli-gible for a payment on a Distribution Date which do not receive that payment on that Date because the Distributable Amount for the Fiscal Year has been exhausted

shall have that payment deferred until the following Distribution Date. Any payment obligation so deferred shall retain its position in the FIFO queue as set forth in Section F.2 and shall be accorded priority as set forth in Section F.2. Deferrals may continue from year to year until the Distributable Amount is sufficient to make the payments due on deferred obligations.

5. **Limitation on Payment of Claims.** Aggregate payments on account of Class Member Claims and Third Party Claims arising from any one individual's exposure to asbestos shall not total more than $500,000, whether the Class Member Claim or Third Party Claim is Liquidated through settlement, mediation, arbitration or in the tort system. Any individual with asbestos-related disease shall be deemed to be a separate exposure for purposes of this section.

G. All Claims Resolved Pursuant to the Trust Distribution Process.

In order to conserve the assets of the Trust, all Claimants are enjoined from filing future litigation based on or arising out of a Class Member Claim or Third Party Claim against the Fibreboard, Continental or Pacific Releasees. Any such claim may only be pursued against the Trust as provided in this Trust Distribution Process.

H. Defendant Class Member Procedures.

Pursuant to the Defendant Class Settlement Agreement, and except as otherwise provided herein, (a) Defendant Class Members are releasing Third Party Claims against the Trust, Fibreboard Releasees, Continental Releasees and Pacific Releasees (except that nothing in this Trust Distribution Process or the Defendant Class Settlement

Agreement shall be read as releasing, or be deemed to release, any claims whatsoever Defendant Class Members may have against the Continental Releasees and Pacific Releasees other than those arising out of, or in any way predicated upon obligations created by, the Insurance Policies); (b) Fibreboard Corporation and the Trust are releasing contribution and indemnity claims arising out of Class Member Claims; and (c) the Continental Releasees and Pacific Releasees are releasing any claims (except for reinsurance claims) arising out of Class Member Claims they may have against Defendant Class Members; provided, however, that Defendant Class Members shall have rights against the Trust and the Trust shall succeed to Fibreboard's rights against Defendant Class Members to the extent provided for under this Trust Distribution Process. Without enlarging any substantive rights accorded them by this Trust Distribution Process, Defendant Class Members shall have such procedural rights (relating to procedural issues not expressly dealt with by this Trust Distribution Process) reasonably necessary to pursue or defend rights accorded them by this Trust Distribution Process. Class Member Claims against the Trust to which Defendant Class Members succeed shall be governed by this Section H of the Trust Distribution Process. Settlement Class Members, Fibreboard Corporation, Continental, Pacific and the Trust are bound by the terms of this Section and must abide by the following procedures in connection with suits by Settlement Class Members for asbestos-related injury or disease against Defendant Class Members.

1. **Claims Liquidated Before Judgment Against Defendant Class Members.**

a. **Calculation of Set-Off Amount.** If a Settlement Class Member Liquidates his or her Class Member

Claim against the Trust before judgment is rendered in litigation between the Settlement Class Member and Defendant Class Member(s), the Trust (itself or in Fibreboard Corporation's stead) shall be deemed, in such ongoing litigation, to be (i) a settled defendant within the meaning of the law which governs the judgment entered by the trial court (or any underlying verdict) (the "Judgment Forum Law") and (ii) a legally responsible joint tortfeasor under Judgment Forum Law, without introduction of further proof. Any judgment obtained by a Settlement Class Member against Defendant Class Member(s) shall be reduced or set off to reflect the Settlement Class Member's settlement with the Trust in the manner (whether pro tanto, pro rata, jury allocation or apportionment or otherwise), and in the amount provided for under Judgment Forum Law. Where the dollar amount of the settlement between the Trust and the Settlement Class Member is relevant to the calculation of any such reduction or set off, that dollar amount shall be the total amount agreed to by the Settlement Class Member and the Trust in settlement of the Class Member Claim, including all sums paid and agreed to be paid, without any reduction to present value for claims paid or to be paid within three years of Liquidation. For that portion of any claim not to be paid within three years of Liquidation, the amount of reduction or set off will be calculated at present value as of the end of that three year period. Trust estimates as to the length of time likely to elapse before future payments will be made will be binding on Defendant Class Members and Settlement Class Members alike. Where the judgment against the Defendant Class Member(s) resolves only a portion of the Class Member Claim or potential Class Member Claim that the Class Member has settled with the Trust (for example, personal injury as distinct from wrongful death claims), the dollar amount of the settlement between the Trust and the Settlement Class Member used in calculation of any reduction or set off shall reflect any

apportionment made by the Trust and the Settlement Class Member reasonably and in good faith with regard to rights of the Defendant Class Members under this Trust Distribution Process, provided (i) that Defendant Class Members shall retain any rights available to them under Judgment Forum Law to challenge such apportionment, and (ii) that wherever Judgment Forum Law calls for apportionment of economic and non-economic damages, the value assigned to the Trust's settlement of a Class Member Claim shall be allocated between economic and non-economic damages in the same proportion that the subsequent judgment or underlying verdict against Defendant Class Member(s) allocates such damages, notwithstanding any apportionment set forth in the settlement documents.

b. **Status of the Trust at Trial.** The Settlement Class Member and the Trust shall consent to any procedures required in order to enable the trial court to establish the amount of any judgment reduction or set off in respect of a Trust settlement as if the Trust, itself or in Fibreboard Corporation's stead, had been a party to the litigation prior to settlement. Should a trial court require that the Trust or Fibreboard Corporation be a party in order to establish such amount, no objection shall be made by the Trust or the Settlement Class Member to the filing by Defendant Class Member(s) of a third-party complaint or to the joinder of the Trust, for itself or in Fibreboard Corporation's stead, as a party for this limited purpose only. The Trust, if made a party, shall not be required to enter an appearance, be subject to discovery as a party, or be subject to default or other trial court process or procedure. Under no circumstances shall Fibreboard Corporation or the Insurers be made parties for any purpose.

c. **Discovery and Informational Issues.** The Trust shall comply with the rules of discovery under Judgment

Forum Law concerning requests for product exposure and disease information provided by the Settlement class Member pertaining to such Class Member Claim. In response to a Defendant Class Member request, the Trust and the Settlement Class Member shall promptly verify, no later than the start of jury selection in the trial of an action by the Settlement Class Member against the Defendant Class Member, the fact of the settlement; and in accordance with Judgment Forum Law, also shall provide information regarding the amount and terms of any such settlement of a Class Member Claim. Without waiver by the Trust or Settlement Class Members of their rights to object to discovery of such information, neither product exposure nor disease information provided pursuant to this Subsection H.1.c shall be considered inadmissible at trial based on Rule 408 of the Federal Rules of Evidence or any of its state law counterparts.

2. **Claims Not Liquidated When Verdict or Judgment Obtained Against Defendant Class Members.**

a. **Effect of Verdict or Judgment.** Except as provided in Section H.2.b. and Section H.3, if a Settlement Class Member goes to judgment or verdict against one or more Defendant Class Members without having Liquidated his or her Class Member Claim against the Trust, the Settlement Class Member forever waives and releases that portion of his or her Class Member Claim against the Trust which would have been determined (under principles of Judgment Forum Law unaffected by Global Approval Judgment) by the verdict or judgment had the Trust for itself or in Fibreboard Corporation's stead been a judgment defendant.

b. **Retention of Several Liability Clai** Notwithstanding any other provision of Section H.2, where (under principles of Judgment Forum Law unaffected by Global Approval Judgment) the Trust's liability to a Settlement Class Member would be several only, or where the Trust's liability as to a particular category of damages (for example, non-economic damages) would be several only, a Settlement Class Member shall retain that several-only aspect of his or her claim against the Trust, even if the Settlement Class Member goes to judgment or verdict against a Defendant Class Member without having Liquidated his or her Class Member Claim. However, no aspect of the Class Member Claim to which principles of joint or joint and several liability would apply shall be so retained. Should the Trust thereafter settle with the Settlement Class Member based only on the Trust's several liability, the release shall state that Third Party Claims based on joint, or joint and several, liability are not barred by virtue of the several liability

settlement and may be pursued in accordance with the provisions of this Trust Distribution Process.

c. **Payment of Verdict or Judgment.** Upon payment of a verdict or judgment returned prior to Liquidation of the underlying Class Member Claim, the Defendant Class Member(s) shall succeed in all respects to that portion of the Class Member Claim against the Trust which would have been determined (under principles of Judgment Forum Law unaffected by Global Approval Judgment) by the judgment in the action against the Defendant Class Member had the Trust for itself or Fibreboard Corporation's stead been a judgment defendant, except to the extent provided in Sections H.2.b and H.5 hereof, and may pursue such Class Member Claim in accordance with this Trust Distribution Process. Notwithstanding any contrary provisions of Judgment Forum Law, a Class Member Claim to which a Defendant Class Member may succeed under this subsection upon payment of a verdict or judgment shall not be lost or extinguished by virtue of a Defendant Class Member's settlement with a Settlement Class Member reached after a contested trial resulting in verdict, or a verdict or jury or court fact finding as to damages or judgments.

3. **Tort System Claims Against the Trust.**

Should a Settlement Class Member proceed to litigation against the Trust pursuant to Section D of this Trust Distribution Process, no objection shall be made in such tort system cases by the Trust or the Settlement Class Member to the filing by Defendant Class Member(s) of a third-party or cross-complaint against the Trust as successor to Fibreboard Corporation under the Global Approval Judgment. Without in any way waiving or limiting the provisions of this Trust Distribution Process limiting the Trust's liabilities with respect

to Class Member Claims and Third Party Claims when a Class Member Claim proceeds to litigation against the Trust in the tort system pursuant to Section D, Defendant Class Members shall retain against the Trust whatever rights of contribution and/or indemnification they otherwise would have had against Fibreboard Corporation under Judgment Forum Law and the Trust shall retain whatever Fibreboard Corporation rights of contribution and/or indemnification it would have had against Defendant Class Members under Judgment Forum Law. In the event that after a verdict or judgment against a Defendant Class Member, the Defendant Class Member upon assertion of its rights is determined to have a valid contribution claim or indemnity claim against Fibreboard or the Trust under Judgment Forum Law, the Settlement Class Member's verdict or judgment against the Defendant Class Member shall be reduced or set off in the amount necessary under Judgment Forum Law to satisfy such Defendant Class Member's claim for contribution or indemnity against Fibreboard or the Trust. Nothing in this Section H.3 or in Section H.2.a shall prevent the Settlement Class Member from liquidating and collection pursuant to other provisions of Section D of this Trust Distribution Process his or her claim against the Trust based on the verdict or judgment referred to in this Section H.3.

4. **Litigation Between Defendant Class Members and Settlement Class Members.**

In any litigation between Defendant Class Members and Settlement Class Members each shall retain their respective rights under Judgment Forum Law to introduce evidence at trial.

Under no circumstances (other than the commencement by the Trust of formal bankruptcy or insolvency proceedings) shall the Trust (or Fibreboard Corporation) be treated as a bankrupt or insolvent defendant, nor shall the Trust (or Fibreboard Corporation) be considered, for purposes of litigation between Defendant Class Members and Settlement Class Members only, a person who cannot be made a party for lack of personal jurisdiction, or otherwise a party over whom a Settlement Class Member is unable to obtain judgment.

5. **Pursuit of Third Party Claims.**

a. **Defendant Class Member to Stand in Settlement Class Member's Stead.**

In pursuing any Class Member Claim against the Trust to which a Defendant Class Member has succeeded under subsection H.2.c above, (i) the Defendant Class Member shall stand in the stead of the Settlement Class Member in respect of whose Class Member Claim the Defendant Class Member has succeeded, (ii) such Class Member Claim shall be resolved by Defendant Class Members under this Trust Distribution Process in the same manner as such Class Member Claim would have been resolved had it been asserted by the Settlement Class Member, and (iii) it shall be evaluated on the same basis as if the Settlement Class Member directly presented his or her Class Member Claim to the Trust, without any enhancement, discount or limitation because it is asserted by a Defendant Class Member. Defendant Class Members must present evidence of such Class Member Claims in the same manner as Settlement Class Members; provided, however, that Defendant Class Members are not required to provide information unavailable to

them because such information is solely within the control of the Settlement Class Member. In any event, however, Defendant Class Member Claims are to be evaluated by the same standards as Class Member Claims. For the limited purpose of pursuing Class Member Claims, or otherwise in respect of assertion of other rights specifically granted under this Trust Distribution Process, Defendant Class Members shall be treated as beneficiaries of the Trust; provided, however, that under no circumstances shall Section H.6 below apply to Class Member Claims to which Defendant Class Member have succeeded.

b. **Resolution of Claims.** Notwithstanding any other provision of this subsection, Class Member Claims to which Defendant Class Members have succeeded under Section H.2.c hereof or Residual Claims shall be decided by binding arbitration under Section C.2 of this Trust Distribution Process, if not settled previously, and may not exit to the tort system. In such arbitration and in its negotiations with Defendant Class Members, the Trust shall not assert any Fibreboard Corporation defenses based on the state of the art, or failure to show negligence or product defect (whether based upon design, manufacture or failure to warn), except in those circumstances under which the Trust would also have asserted those defenses against the Settlement Class Member to whose Class Member Claim the Defendant Class Member has succeeded. Moreover, the Trust shall not assert failure to show negligence or product defect as a defense where a Class Member Claim to which the Defendant Class Member has succeeded is brought by a former manufacturer and/or distributor of asbestos-containing high-temperature pipe and block insulation, if the issues of product defect or negligence (as the case may be) covering such pipe and block insulation were fully litigated to an adverse result against that Defendant Class Member at trial of the underlying asbestos-related personal injury action. Under no other circumstances

shall the results of such trial be given preclusive effect in any such arbitration. Any arbitration under this subsection shall be confidential, and no statement made, or contention advanced, at such arbitration shall be introduced as evidence or otherwise used against the maker or proponent of such statement or contention in the course of any proceeding other than arbitration under this Trust Distribution Process.

c. **Processing and Payment of Claims.** Class Member Claims to which Defendant Class Members have succeeded shall be included in the FIFO queue established pursuant to this Trust Distribution Process. For purposes of processing, the position of a Class Member Claim to which a Defendant Class Member has succeeded in the FIFO queue shall be determined by the earlier of (a) the date the Settlement Class Member filed with the Trust the underlying Class Member Claim or (b) the date on which the Defendant Class Member paid the Settlement Class Member with respect to the judgment or verdict. For purposes of payment, a Class Member Claim to which a Defendant Class Member has succeeded will be placed within the appropriate Schedule Category set forth in Section F.2 and, within such category, in FIFO order, based on the date on which the Defendant Class Member paid the Settlement Class Member in respect to the judgment or verdict. Class Member Claims to which Defendant Class Members have succeeded, shall be paid under the terms set forth in Section F.3.a. Prior to receiving payment the Defendant Class Member shall have provided a release as described in Section B.4.

d. **Multiple Claims or Multiple Third Party Claims.** Where Defendant Class Members succeed to a portion of a Class Member Claim by virtue of payment with respect to any verdict or judgment where a Beneficiary retains an interest in the several liability aspect of the same Class

Member Claim (regardless of the number of Defendant Class Members who may have succeeded to portions of the Class Member Claim) ("Partial Claims"), Settlement Class Members and Defendant Class Members shall comply with procedures established by the Trust to ensure that all persons with rights under this Trust Distribution Process in respect of the same Class Member Claim coordinate their efforts so that all such Partial Claims can be processed and Liquidated in a single proceeding, designed to resolve all elements of such claims, whether malignancy or non-malignancy, and all causes of action, whether for personal injury, death, loss of consortium, or otherwise against the Trust; provided, however, that nothing in the foregoing shall prevent the Trust, a Settlement Class Member or a Defendant Class Member, as the case may be, from electing to give or take a limited, non-malignancy release under this Trust Distribution Process. In evaluating Partial Claims in the course of such a single proceeding, the Trust shall not differentiate among the aspects of such claims based on whether the right to payment is asserted by a Settlement Class Member or Defendant Class Member. In those circumstances where different parties (whether Settlement Class Member and Defendant Class Member(s), or more than one Defendant Class Member) assert rights under this Trust Distribution Process in respect of the same Class Member Claim, any disputes regarding such Class Member Claim shall be presented in a single arbitration. Should more than one Defendant Class Member be entitled to payment from a single settlement or award by the Trust, the Defendant Class Members shall share such amount in the same proportion that each made payments to the Settlement Class Member. Notwithstanding the above or any other provision of this Trust Distribution Process, (i) a Settlement Class Member shall not be entitled to take to the tort system a Class Member Claim if any portion of that claim was resolved as to a Defendant Class Member by settlement or in binding

arbitration pursuant to Section H.5.b of this Trust Distribution Process; and (ii) Settlement Class Members retain all rights to resolve their Partial Claims with the Trust after the verdict or judgment against the Defendant Class Member and before one or more Defendant Class Member's related Partial Claim(s) is submitted to the Trust in writing for resolution; provided, however, that the Settlement Class Member's resolution of his or her Partial Claim shall not bind any Defendant Class Members or the Trust with respect to any Defendant Class Member's related Partial Claim. The Trust shall settle Partial Claims only in accordance with Section H.5.d-g.

e. If a Settlement Class Member resolves his or her Partial Claim pursuant to Section H.5.d, the Trust or arbitrator will apportion the settlement or award among all elements of the claims that are being resolved (for example, personal injury, wrongful death, loss of consortium, etc.). Until such time as the Partial Claim of a Defendant Class Member has been Liquidated and paid or denied, the related Partial Claim of a Settlement Class Member Liquidated under Section H.5.d(ii) shall only be entitled to payment of

(i) that portion of the Settlement Class Member's Partial Claim allocated to resolve claims which were not included in the verdict or judgment against the Defendant Class Member, plus

(ii) $500,000 minus the amount in (i), multiplied by the ratio of (x) the several liability portion of the verdict or judgment against the Defendant Class Member to (y) the total underlying verdict or judgment against the Defendant Class Member. Any award of punitive or exemplary damages will be excluded from the verdict or judgment against the Defendant Class Member when calculating (x) or (y).

f. The provisions of Section H.5.e shall not apply if the underlying total verdict or judgment in favor of a

Settlement Class Member against one or more Defendant Class Members (excluding any award for punitive or exemplary damages) is $500,000 or less.

g. The provisions of Section H.5.e will cease to apply if the Partial Claim of a Settlement Class Member plus the related Partial Claims of all Defendant Class Members are Liquidated for a total of $500,000 or less.

h. The provisions of Section H.5.e will cease to apply as to any Partial Claim of a Defendant Class Member which is not submitted to the Trust and served on the Settlement Class Member, or his attorney, if any, within three months of the date on which the underlying judgment against the Defendant Class Member becomes final.

6. **Cooperation for Court Approvals.** Upon liquidation of his or her Class Member Claim, each Beneficiary shall cooperate with the Trust in seeking any needed trial court approval under Judgment Forum Law of the settlement.

7. **No Modification Without Consent.** Neither the terms of this Section H nor as they apply to Defendant Class Members the provisions of this Trust Distribution Process as to arbitration may be modified without the written concurrence of the Representative Defendant. Other provisions of the Trust Distribution Process may be modified (after prior notice to the Representative Defendant) without the concurrence of the Representative Defendant unless the modification (i) has an adverse effect on Defendant Class Members and (ii) discriminates against them vis-a-vis Settlement Class Members, in which case the modification shall require the written concurrence of the Representative Defendant.

I. Attorneys' Fees.

Attorneys' fees payable in connection with Class Member Claims Liquidated and paid through the Trust Distribution Process, whether as a result of settlement, an arbitration award, or a judgment obtained in the tort system, and whether or not calculated as a percentage of recovery, shall be the lower of the fee provided in the contract between the Beneficiary and counsel and 25%. Costs related to the prosecution of the claim shall be subtracted from the recovery before calculating the attorney's fee. Legal fees shall be paid pro rata from the payments due to the Beneficiaries as such payments are made by the Trust.

J. Amendment.

No amendments or waivers of this Trust Distribution Process will be permitted except as set forth in Section 3.1 of the Trust Agreement.

APPENDIX U

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:93cv_____

New Orleans, Louisiana

GERALD AHERN, JAMES DENNIS and CHARLES W. JEEP, On Behalf of Themselves and Others Similarly Situated	*	
Plaintiffs	*	
v.	*	September 9, 1993
FIBREBOARD CORPORATION	*	6:00 p.m.
Defendant	*	
CONTINENTAL CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY	*	
Intervenors	*	

EXCERPT FROM THE
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT M. PARKER
UNITED STATES DISTRICT COURT PRESIDING

Page 10, Lines 1-25

MR. WACHTELL: Your Honor, in order to show cause or the order granting the temporary restraining order and setting the preliminary injunction down for hearing, we have referred to a list of lawyers who have regularly represented asbestos claimants. It is a list to whom we contemplate giving notice as specified in the order, and I want to file that list with the Court.

THE COURT: Very well. Let me inquire of Bill Parker, is it your intention to return to Tyler this evening?

MR. PARKER: Yes, sir.

THE COURT: You are hereby designated a deputy district clerk of the Eastern District of Texas, and I will entrust the original of the papers to you, if you deliver them to Ms. Thompson, then, at 9:00 in the morning.

MR. PARKER: I will do so.

MR. INSELBUCH: If I could just add for the record, the service list of counsel is the service list that the Manville Personal Injury Settlement Trust uses, and it is my understanding that that list includes every lawyer who has filed a claim on behalf of a claimant before that Trust, and as far as

we are all aware it is the most complete list that we could put together.

THE COURT: Thank you, counsel. Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than

Supreme Court, U.S.
FILED
MAR 31 1997
CLERK

No. 96-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

Paul J. Bschorr
Richard B. Sypher
David F. Owens
DEWEY BALLANTINE
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Counsel for Respondent Pacific Indemnity Company

Herbert M. Wachtell*
Meyer G. Koplow
Jeffrey M. Wintner
Meir Feder
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Counsel for Respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company

* *Counsel of Record*

(Counsel Continued Inside)

Additional Counsel for Respondent Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company:

Rodney L. Eshelman
Donald T. Ramsey
CARROLL, BURDICK
& MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

Stuart Philip Ross
Sean M. Hanifin
Merril J. Hirsh
ROSS, DIXON & MASBACK, L.L.P.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

Otis Carroll
Bill Parker
IRELAND, CARROLL
& KELLEY, P.C.
6101 S. Broadway, Suite 500
Tyler, TX 75703
(903) 561-1600

Additional Counsel for Respondent Pacific Indemnity Company:

John H. Minton
Michael E. Jones
POTTER, MINTON, ROBERTS,
DAVIS & JONES, P.C.
P.O. Box 359
Tyler, TX 75710
(903) 597-8311

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding with the following exceptions. William James Mitchell is a plaintiff class representative not listed in the petition; other parties not listed in the petition are Paul Cochran, Ida Beck and Marion Behee.

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly owned subsidiaries of respondent Pacific Indemnity Company.

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Z. Chaffee, *Some Problems of Equity* (1950) 21, 23

13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530 19

STATEMENT OF THE CASE

In an attempt to leverage themselves upon two cases considered by the Court this term, petitioners have presented the class action settlement in this case (known as the "Global Settlement") and the Fifth Circuit decision approving it in a totally misleading fashion. They portray the Global Settlement as a carbon copy of the settlements in *Amchem Products, Inc. v. Windsor*, No. 96-270 and *Adams v. Robertson*, No. 95-1873 (writ dismissed as improvidently granted, March 3, 1997), cases involving the issue whether class settlements may be approved on the basis of projected increased efficiency over individual adjudications in the tort system. But as both lower courts expressly found — in findings petitioners wholly ignore — the basis of the Global Settlement here is decidedly different: a unitary class settlement was necessary in this case *in order to secure the class's only possible source of meaningful recovery*. App. 39a, 41a, 197a-198a, 207a.

On August 27, 1993, when the Global Settlement was reached in principle, the parties were confronted with the following circumstances. The class, comprised of over 100,000 future asbestos claimants, had potentially well over $1 billion in claims against Fibreboard Corporation. Fibreboard, however, also faced $2 billion in *current* settlement obligations, and had non-insurance assets sufficient to pay no more than a small fraction of these amounts. App. 8a, 243a. Instead, the source of *any* meaningful recovery for class members lay in two insurance policies that Fibreboard had purchased in the 1950s from respondents Continental and Pacific. Although Fibreboard claimed that these policies provided it with no-aggregate-limit coverage, the two insurers were disputing coverage in a massive California litigation that, as both lower courts found, Fibreboard had a "significant risk" of losing outright. App. 18a, 41a-42a, 323a. The very morning of the agreement in principle, the California Court of Appeal had heard the final argument in that coverage litigation and announced its intention to rule expeditiously.

For class members, then, a settlement of the coverage dispute was the only possible alternative to catastrophic risk: a Fibreboard loss in the coverage litigation would render their claims against Fibreboard, no matter how meritorious, virtually worthless. App.

41a, 323a-324a. But as the District Court found and the Fifth Circuit confirmed, a settlement of the coverage dispute was possible only as part of a unitary resolution involving the class. App. 197a-198a, 207a, 340a-341a, 41a-42a. Fibreboard — which viewed a potential victory in the coverage dispute as giving it no-aggregate-limit insurance coverage sufficient to ensure its survival — was not about to settle that dispute unless its survival was ensured by such a settlement: a result that realistically could be achieved only by a settlement binding on all claimants. *See* pp. 6-7, *infra*. The insurers, likewise, were not about to agree to pay out the billions of dollars necessary to make any overall settlement fair unless they could be certain that all future claimants, as well as Fibreboard, were bound by that settlement. As the District Court put it, "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 198a, 41a-42a, 47a-51a. *See* pp. 6-8, *infra*.

This case thus presents precisely what is *absent* in *Amchem* and was *absent* in *Adams*: a uniquely compelling reason why a unitary class settlement was necessary. This compelling reason, moreover, was "commonly held" by class members, each of whom shared the risk of a Fibreboard defeat in the coverage litigation and, consequently, an overriding interest in a settlement that would fairly resolve that risk. App. 24a-25a & n.8. And contrary to petitioners' repeated insinuations, the Global Settlement — while resolving these commonly held issues "regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation" where there may not be enough money to go around — did *not* liquidate the recoveries of individual class members. App. 24a & n.8.

As such, this case does not present the novel issues involved in *Adams* and *Amchem*:

(1) It does not present the question raised in *Adams* whether opt-out rights may be denied as to claims for money damages simply because a proposed settlement would provide equitable remedies that would be more efficient than individual suits for damages in the tort system. To

the contrary, as detailed below, the plain language of Fed. R. Civ. P. 23(b)(1)(B) and hundreds of years of precedent from this Court and at common law make clear that a non-opt-out class is called for where, as here, a unitary resolution is necessary to protect the class. *See* pp. 20-27, *infra*.

(2) It does not present the question that the petitioners say is raised in *Amchem* whether a settlement may be used "as a sufficient basis in and of itself to" certify a class. Pet. 12. To the contrary, the Fifth Circuit — in a portion of its opinion that petitioners conspicuously fail to mention — expressly *disavowed* any such settlement-alone-suffices approach, as did the District Court. App. 23a-24a & n.8; 190a; *see* pp. 15-17, *infra*. Indeed, the Fifth Circuit indicated its "likely agree[ment]" with the result reached by the Third Circuit in *Amchem* on the apparent facts of that case. App. 24a n.8.

(3) And, finally, this case does not present the claims raised in both *Adams* and *Amchem* about the fairness of the settlement in question: petitioners do not contend now, and did not contend below, that the over-$1.5 billion fund that the Global Settlement creates for the class is unfair.

Instead, this case presents unique circumstances in which class members needed a unitary resolution in order to resolve a common overwhelming risk; in which no one disputes that the plain language of Rule 23(b)(1)(B) authorized a non-opt-out class; in which an indisputably fair unitary resolution was reached and was approved, after exhaustive inquiries, by the courts below; and in which the appropriateness of such a resolution was established by centuries of jurisprudence. As petitioners' own counsel has acknowledged (in a statement completely contrary to the thesis of the petition), the Fifth Circuit decision does not "offer significant precedent for future . . . class actions" because "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again. [The panel's decision is] only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't

occur very often." Business Insurance, August 5, 1996, at 38. There is accordingly no reason for further review by this Court, and the petition should be denied.

A. Background and Procedural History

The Global Settlement, reached on the very eve of the potentially final appellate argument in the coverage litigation after extended, hard-fought negotiations, resolves the risks that litigation posed to the class, to Fibreboard and to the insurers. It does so on financial terms that not even petitioners claim are unfair to the class: payment of over $1.5 billion to be placed in an asset-conserving, independent Trust for the benefit of "future" claimants in return for their releasing Fibreboard and the insurers from personal injury asbestos claims. App. 15a-16a. And it accomplishes this in a manner that maximizes the amount of money class members will actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. App. 328a-331a.

Equally important, however, is what the Global Settlement does *not* do: it does *not* liquidate a single personal-injury tort claim for money damages; and it does *not* deprive class members of their right to control their individual claims. App. 24a & nn. 7-8, 50a-51a. Instead, those claims will be liquidated on an individual basis as they arise. Individual claimants may either resolve their claims consensually with the Trust through *non*-binding negotiation, mediation or arbitration; or — if they are dissatisfied with their proposed recovery for any reason — they have the absolute right to exit into the tort system to litigate their claims, with the Trust substituting for Fibreboard as the defendant. App. 16a, 312a.* In short, the Global Settlement resolves *only* class members' overriding common interests in ending the enormous risk posed to all of them by the coverage litigation, and does *not* resolve the matters — what each of them will recover — as to which they may differ.

---

* As set forth below, the Global Settlement — in order to preserve the trust corpus for the benefit of all claimants — does place certain limitations on claimants once they exit to the tort system. Both the Fifth Circuit and the District Court found those limitations not to be significant. *See* pp. 13-14, *infra*.

So the District Court found in comprehensive findings of fact, conclusions of law and an extensive opinion issued after an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners — a hearing which itself followed broad rights of discovery exercised by petitioners and an unprecedented $18 million worldwide mail, newspaper and television campaign designed to bring notice of the proposed settlement and the fairness hearing to persons having an interest in the matter. App. 149a-479a. The District Court found, as noted above, that the risks posed to all parties by the coverage dispute could be resolved only through a unitary settlement encompassing all claims, and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution permitting equitable distribution." App. 198a, 197a, 207a. It went on to find that the Global Settlement is fair to the class, and — given the risks posed by the coverage dispute — indeed represents a "far superior" outcome for the class than any practical alternative. App. 207a, 332a-333a.

The Fifth Circuit affirmed the District Court's findings, conclusions and opinion, with one judge dissenting; it thereafter denied petitioners' suggestions for rehearing *en banc*, with six judges dissenting. Respondents respectfully refer this Court to the District Court's extensive findings and to the Fifth Circuit majority opinion for a full description of the Global Settlement and the circumstances and negotiations that led to it.*

B. The Uncontested Record

Petitioners, however, wholly ignore the findings of the courts below, and instead portray this case in a manner diametrically

* Respondents also respectfully refer the Court to the brief in opposition they have submitted today to a second petition for writ of certiorari filed in this case by a separate group of petitioners (the "Flanagan Petitioners"). *Flanagan v. Ahearn*, No. 96-1379. That brief fully responds to the Flanagan Petitioners' gross mischaracterization, repeated in part by petitioners here and by the dissent below, of the Global Settlement negotiations and particularly of the limited role in those negotiations played by Judge Parker.

opposed to those findings. They proceed as if there were somehow no need for the class to participate in a settlement here; as if the Global Settlement actually liquidated the individual recoveries of hundreds of thousands of individual tort claimants; and as if it had nothing to recommend it other than alleviating docket congestion. Pet. 1, 22. They then purport to cloak themselves in the due process rights of future asbestos victims — the very class members *most* at risk from the coverage dispute, since Fibreboard's meager non-insurance assets would be long exhausted before their injuries become manifest — and ostentatiously proclaim that those rights have been cast aside by "judicial legislation" "foist[ed] upon the class" in order to bail out "mass tort defendants" and "insurance titans." Pet. 16-17, 22, 26.

This presentation — which is obviously intended to deflect attention from the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage dispute — was roundly rejected by both courts below and is nothing short of a fantasy. This is clearly shown by factual findings made by the District Court and affirmed by the Fifth Circuit that appellants pretend do not exist, but nowhere seriously dispute.

1. The risk posed to the class by the coverage dispute required a unitary resolution among all parties.

For all their rhetoric, petitioners never take issue with the findings of the District Court and the Fifth Circuit that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 198a, 207a, 41a. Indeed, for months in the spring and summer of 1993, as they had earlier, Fibreboard and one insurer (Continental) had tried to achieve a "bilateral" settlement of the coverage dispute *without* the participation of the plaintiffs — and had failed. App. 279a-280a. As the lower courts determined, the unique circumstances of this coverage dispute — involving a claim of no-aggregate-limit, billion-dollar-plus coverage on which the insured's corporate survival was entirely dependent — did not permit a piecemeal settlement. App. 197a-198a, 207a.

To the contrary, Fibreboard's coverage claims were the only thing that stood between it and insolvency — it believed it would remain a viable company, solve its asbestos problem and preserve its net worth *if* it prevailed in the coverage litigation; it would be immediately bankrupt if it lost. App. 323a-324a. Accordingly, it was not about to settle that litigation on terms that would still potentially leave it facing bankruptcy. Unless it were to receive from the insurers a sum of money sufficient absolutely to ensure that it would be in a position to pay all asbestos claims and all costs of defense in an ongoing litigation regime, it was not willing to leave itself naked of insurance and yet exposed to further claims by asbestos plaintiffs. App. 274a-275a, 340a. If that were its only option under a settlement, management could meet its obligations to shareholders only by litigating the coverage dispute to conclusion. *Id.* Thus, from Fibreboard's standpoint, any settlement of that dispute either had to (1) be so financially lucrative that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy; or (2) involve the asbestos plaintiffs.

The insurers, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential open-ended, no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which, as the expert witnesses at the fairness hearing testified and the District Court and Fifth Circuit found, they had a significant chance of escaping any liability at all (App. 18a, 41a-42a, 323a) — by giving Fibreboard so much money that its survival would be placed absolutely beyond question in the face of continued asbestos claims and defense costs. App. 295a-296a. Nor were they willing to pay the enormous sums entailed by a settlement without ensuring that they had ended their exposure once and for all. The Fifth Circuit fully compiled the reasons why the insurers could not afford to remain exposed to opt-outs, not the least of which was that the timing of the coverage appeal would have entailed giving class members the right to opt-out *after* the outcome of the appeal was known, and hence a one-way option on the coverage litigation. App. 9a-10a, 272a-273a, 340a. If those were the alternatives, the *insurers* would litigate the coverage dispute to conclusion. *Id.* Thus, from

the insurers' standpoint, any settlement of the coverage dispute involving sums acceptable to Fibreboard had to involve all the asbestos plaintiffs.

The situation facing the class was thus simple. The insurers and Fibreboard could not come to terms on a settlement of the coverage dispute without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage dispute continued. Those parties were consequently offering the class a tremendous amount of money as part of a global settlement of their claims — an amount that, while not guaranteeing all class members a 100% recovery, was indisputably a fair resolution of their claims. App. 63a-64a, 325a-327a.* The class could either secure that enormous fund for itself, or run the significant risk of losing the insurance entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets. App. 42a-43a.

In light of this, petitioners' portrayal of the Global Settlement as an unnecessary expedient designed to let big business off the hook is grossly inaccurate. When the actual nature of the circumstances that gave rise to the Global Settlement are considered, the true import of petitioners' arguments become clear: as they would have it, class members — as a matter of their *own* due process rights, no less — had no alternative but to continue to suffer the risks of the coverage litigation. In other words, they simply *had to* act against their own best interests.

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* Petitioners' constant assertions that the class lacked "leverage" and that Fibreboard and the insurers had "enormous power" over the class (Pet. 12) are thus completely contrary to fact. Instead, far more probative on this point than petitioners' empty posturing is their tacit concession that the Global Settlement — despite the class's supposed lack of "leverage" in negotiating it — is financially fair to the class. Indeed, petitioners never even raised any such claim of supposed lack of leverage below; and, as the lower courts found, the background to the Global Settlement negotiations actually gave the class *additional* leverage over the insurers: Fibreboard's prior program of settling claims by "assigning" rights under its insurance policies had substantially inflated settlement values, and class counsel were able to use those values to ratchet up the class's recovery. App. 374a.

2. The Trilateral Agreement is markedly inferior to the Global Settlement from the perspective of class members.

The absolute need for a unitary resolution on these facts is perhaps best demonstrated by what petitioners claim to be their saving grace — the "Trilateral Agreement" between Fibreboard and the insurers. The Trilateral Agreement grew out of a last-minute demand by class counsel that, as a condition to the class's entry into the Global Settlement, Fibreboard also settle the insurance dispute directly with the insurers as a "back-up" to the Global Settlement, so as to ensure that — even if the Global Settlement were not approved — the coverage dispute would not proceed. App. 295a-296a. The Trilateral Agreement accomplishes that, for the same consideration *from* the insurers as the Global Settlement. App. 327a-328a.* However, it does not provide the same benefits *to* class members. Because it leaves class members' claims to be resolved in litigation against Fibreboard — and does not provide for the equitable distribution and asset-conservation procedures established by the Global Settlement — it leaves class members exposed to a race to the courthouse, higher transaction costs (including contingency fees), dissipation of the insurance proceeds through enormous defense costs, and a significant risk that the money will run out before all sick claimants get paid. App. 39a, 324a-325a, 327a-332a.

The record is uncontroverted that Fibreboard never would have acceded to the Trilateral Agreement except as a condition to a unitary resolution through the Global Settlement. App. 279a-280a. Indeed, Fibreboard resisted to the end the concept that the Trilateral Agreement would require the insurers to pay it no more than they were to pay under the Global Settlement, claiming instead that Fibreboard needed many additional hundreds of millions of dollars

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* Although the insurers would pay $2 billion to Fibreboard under the Trilateral Agreement (as compared with $1.525 billion to the Trust under the Global Settlement), the additional $475 million was agreed to be paid because under the Trilateral Agreement — but not the Global Settlement — Fibreboard would continue to bear responsibility for hundreds of millions of dollars of "presents" claims and certain other liabilities. App. 320a-321a.

to pay for the defense costs it would incur in the tort system and to protect against the uncertainties of futures claims estimates. App. 295a-296a. The record thus completely belies the unexplained assertion of the dissent below, echoed by petitioners here, that "[t]he *Ahearn* settlement is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth. Fibreboard and the insurers did not need class proceedings to reach the first agreement." App. 84a. (The dissent's assertion also totally ignores that the Trilateral Agreement — which it inaccurately denominates the "first agreement" — likewise *did* "need class proceedings" to be accomplished. Indeed, the same judge who so vehemently dissented from the Global Settlement as illegitimately certifying a class of future asbestos claimants simultaneously voted, without explanation, to *affirm* the District Court's approval of the "back-up" Trilateral Agreement even though it involved certification of the virtually *identical non-opt-out futures class.*[*])

The record is equally clear, moreover, that the class would suffer under the Trilateral Agreement in comparison with the Global Settlement: as the District Court and Fifth Circuit found, the Trilateral Agreement (though a fair resolution of the coverage dispute as between Fireboard and its insurers) is "far" inferior to the Global Settlement from the point of view of the *class* and does not provide enough money to guarantee payment — full or partial — to future asbestos claimants. App. 39a, 51a, 324a-325a. To the contrary, the record is uncontested that, due to the enormous defense expenditures entailed by resolving claims in litigation and the large

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[*] The Trilateral Agreement was conditional on issuance of a final judgment that, in pertinent part: (a) certified the same mandatory class of future asbestos claimants; and (b) declared that the Trilateral Agreement represented a fair settlement of the coverage dispute and cut off any rights class members might have under the insurance policies. That judgment has been issued in a companion case below (*Continental Cas. Co. v. Rudd*), and the dissenting judge and these petitioners supported issuance of that judgment even though many of the legal theories they advance would render that judgment invalid as well. App. 84a, 20a.

contingency fees charged by plaintiffs' lawyers, the class would in the aggregate receive at least several hundred million dollars *less* under the Trilateral Agreement than under the Global Settlement, and a significant number of class members might well receive *nothing* at all. App. 324a-325a, 327a-328a.

For example, the expert testimony at the fairness hearing was that the class would receive $234-477 million *less* under the Trilateral Agreement than under the Global Settlement, even taking Fibreboard's equity into account. App. 327a-328a, JA7: 2054-56, 2768-70; JA125.* There was also expert testimony that, as a consequence — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (App. 325a) — under the Trilateral Agreement: (a) 41-50% of the class, between 104,000 and 127,000 asbestos claimants, would likely be left unpaid (JA117, 118); and (b) Fibreboard "would be unable to pay all the valid claims against it within five to nine years." App. 39a. As the District Court found on the full record, there is a "significant risk" that the Trilateral Agreement would leave "a late-comer component" of the class completely uncompensated. App. 325a, 328a.

3. The plain language of Rule 23(b)(1)(B) is met in this case.

For all petitioners' alliterative flourishes about the alleged "blatant bootstrapping of a 23(b)(3) class into a 23(b)(1)(B) class" (Pet. 22), they *never once* dispute that a non-opt-out resolution is authorized here by the plain language of Rule 23(b)(1)(B). Indeed, even the dissent below expressly acknowledged as much. App. 98a. That language calls for a unitary resolution where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). In other words, in the view of the Advisory Committee (which drafted the Rule), this Court (which endorsed it) and Congress (which passed upon it), individuals cannot opt out of a

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* Citations to "JA" refer to portions of the Joint Appendix in the Fifth Circuit not reproduced in petitioners' appendix.

class where their doing so would irretrievably prejudice their fellow class members' claims. And that, as no one contests, is exactly what would have happened here, by creating the serious risks that all of the class would have recovered nothing via the coverage litigation, or that much of the class would have recovered nothing under the Trilateral Agreement. App. 42a-43a, 51a, 323a-325a.

Faced with this, petitioners are left only with a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B). They contend that a unitary resolution would have been permitted had class members' claims been "*in rem*" claims against a pre-existing "common, limited" fund, but that such a resolution becomes somehow impermissible here because class members needed a unitary resolution in order to secure a fund to compensate them in the first place. Pet. 21-22. They do not explain, however, the supposed significance of this "distinction": certainly it appears nowhere (a) in the language of Rule 23(b)(1)(B), which does not refer to "*in rem*" claims or "common" or "limited funds" at all; (b) in the Advisory Committee Notes to the Rule, which specifically state that the Rule is to operate "in the absence of a fund either present or potential" (Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B)); or (c) in any decided case.

4. Bankruptcy was not an available option for the class.

Although petitioners hint that bankruptcy would have provided an alternative to a unitary class resolution (Pet. 24), they do not quarrel with one central fact: class members could *not* have put Fibreboard into bankruptcy in August 1993. App. 44a, 342a. Bankruptcy proceedings could have been reached only by forcing Fibreboard to litigate for *and lose* its claimed insurance, the only source of real recovery for the class. App. 42a-43a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn $1.535 billion from the insurers and Fibreboard, and force Fibreboard to roll the dice in the coverage litigation: secure in the knowledge that, though the coverage might be lost, a bankruptcy proceeding in which class members would receive pennies on the dollar, if anything, would be waiting to "protect" them.

5. The Global Settlement is financially fair.

Finally, despite their vitriol about "gold turned to lead" and the alleged sacrifice of the class's rights (Pet. 22), petitioners do *not* assert that the Global Settlement is financially unfair to the class. Indeed, the substantive fairness of this settlement is beyond dispute. This settlement transforms disputed insurance coverage into over $1.5 billion cash, and transfers it to independent Trustees for the class's benefit, for distribution to class members in accordance with procedures that ensure that the proceeds will not be dissipated on Fibreboard's costs of defense or plaintiffs' transaction costs (including contingency fees).*

These overwhelming benefits, as the District Court and Fifth Circuit found, far outweigh the few minor ways in which the Settlement might affect the amount of damages some claimants might receive for their claims. App. 338a-340a, 51a. Indeed, these effects are caused principally by provisions of the Settlement designed to *protect* the interests of the very class members about whose rights petitioners profess concern — by avoiding inequitable dissipation of the trust funds through disproportionate windfall awards — and should have only minimal impact in practice on class members' individual recoveries.**

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* Recognizing that the Global Settlement's undisputed fairness demonstrates the emptiness of his "sky-is-falling" rhetoric, the dissenting judge below conjured up an alternate theory to explain why the Global Settlement's fairness has not been challenged: that the "futures" nature of the class impeded fairness-based objections. App. 81a-82a. This theory has no basis in reality. *First*, though this is a "futures" class, a "future" claimant is defined as a person who had not *filed a claim* against (or settled with) Fibreboard prior to August 27, 1993. There are thus tens of thousands of class members with currently manifest injuries. Indeed, there have been thousands of exigent claims settled and paid under the Trust procedures since 1993. *Second*, there is a highly organized and motivated plaintiff's asbestos bar, members of which would likewise not have hesitated to object if they thought the Global Settlement were unfair or otherwise inimical to class members' interests (as many of them in fact did in *Amchem*).

** For example, while petitioners complain vociferously about several of the "limitations" imposed by the Global Settlement (Pet. 7):

(Cont'd)

And while in an ideal world it might have been desirable from the class's standpoint to have Fibreboard's $235 million in equity added to the Settlement (or for that matter, $235 million more from the insurers), this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. App. 41a, 326a, 339a-342a. The important questions are thus whether the $1.535 billion the class was able to extract — whether it comes entirely from the insurers, or were hypothetically to be made up of $1.3 billion from the insurers and $235 million from Fibreboard — is fair and reasonable in light of the risks posed by the coverage dispute, and whether receipt of that fund and resolution of those risks warrants the limitations discussed above. Petitioners do not contest the lower courts' affirmative findings on either point.

(Cont'd)

(1) the $500,000 cap on compensatory damages reflects the facts that only a handful of the over 100,000 plaintiffs to have sued Fibreboard before the Global Settlement was reached had ever recovered more than $500,000 in compensatory damages against it and that the insurance policies at issue in the coverage dispute specified a $500,000 per-person limit (App. 339a);

(2) the elimination of punitive damages reflects the fact that such damages were almost never awarded against Fibreboard in the tort system (App. 338-339a);

(3) although the Settlement establishes certain prerequisites to litigation, it does not deprive class members of their right to control their individual tort claims. The claims resolution procedures thus provide for mediation, non-binding or binding arbitration at claimants' election and a pre-trial conference with the court, but preserve absolute access to the tort system against the Trust for *all* class members if they do not achieve resolutions *they* regard as satisfactory. (App. 16a, 312a); and

(4) the elimination of prejudgment interest and joint-and-several liability will have minimal impact on recoveries, since the Trust process will resolve claims far faster than the current norm and since the overall settlement amount (and hence the recoveries class members will receive) *already* reflects Fibreboard's potential joint-and-several share of other asbestos defendants' liability. App. 339a-340a.

REASONS FOR DENYING THE WRIT

When the class's overriding need for a unitary resolution through settlement and the conceded fairness of the Global Settlement here *are* considered, petitioners' wild hyperbole about the need for review by this Court completely dissipates. The Fifth Circuit's decision was based on settled law establishing the appropriateness of a unitary class resolution where necessary to protect the class; it does not present the issues raised in *Amchem* and *Adams* concerning the permissibility of such a resolution in other circumstances; and there is no cause for further review of this unique case.

I. THIS CASE DOES NOT PRESENT THE RULE 23 ISSUE INVOLVED IN *AMCHEM*.

Petitioners' claim that this case presents the Rule 23 issue under consideration by this Court in *Amchem* is based on a gross distortion of the Fifth Circuit's opinion. To be sure, the Fifth Circuit did reject the extreme position taken by the Third Circuit in *Amchem* — that a court considering certification of a settlement class must totally ignore the settlement and assess class certification "as if the case were going to be litigated." *See* App. 20a-22a. But petitioners' counsel (who likewise served as counsel to the objectors in *Amchem*) declined to defend that extreme and universally rejected position before the Court in *Amchem*,* and similarly do not seek to defend it here.

Instead, petitioners claim overlap with *Amchem* on the ground that the Fifth Circuit allegedly used the fact of a settlement "as a sufficient basis in and of itself to" certify the class. Pet. 12. *But the Fifth Circuit explicitly disavowed any such approach*, as did the District Court. To the contrary, the Fifth Circuit *agreed* with petitioners that — the existence of a settlement notwithstanding — "individual issues" and "differences in state law" would "likely" prevent certification of a settlement class "requesting *individual damages* for members of a global class of asbestos claimants." App. 23a-24a & n.8 (emphasis added). It recognized, however, that this case is fundamentally different: the class here was united in its

* *Amchem*, Tr. Oral Arg. (Feb. 19, 1997), at 40-41.

need to resolve the coverage dispute, and the Global Settlement did not resolve those matters — individual recoveries — as to which class members may differ. As the Fifth Circuit put it:

> The Global Settlement Agreement does not award damages to individual victims: it provides money and an equitable distribution process to pay victims. . . . The named plaintiffs [entered this Settlement] to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. The same concerns affect each member of the [class].

App. 24a-25a.*

The Fifth Circuit further underscored this point by expressly observing this case's "stark contrast" with *Amchem*, a case where, as the Fifth Circuit understood the facts:

> the settlement attempted to award damages to class members based on the severity of their injuries alone. We would *likely agree* with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In [this case], only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in [*Amchem*].

App. 24a n.8 (emphasis added).

* Indeed, the District Court determined that the class here could be certified even "under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context" (App. 190a) — thereby finding that the class could be certified even under the extreme Third Circuit position in *Amchem*.

It is thus not even remotely true, as petitioners extravagantly claim, that "[u]nder the Fifth Circuit's interpretation of Rule 23, literally anyone can be a common, typical, and adequate representative of any random group of people, so long as that person negotiates a class settlement on behalf of that group." Pet. 12. Nor is there any basis whatever for petitioners' constant assertion that the opinion below allows class certification where a settlement first "creates" "common" issues that did not exist "*before* the negotiation" (Pet. 21, 12 (emphasis in original)): as the Fifth Circuit recognized, the class's common need to resolve the coverage dispute created the Global Settlement, not the other way around.*

Once stripped of these baseless assertions, the petition presents only factbound questions under settled law: whether class members had common interests, and whether the class representatives and class counsel adequately served those interests in fairly resolving the coverage dispute. That fact-specific inquiry has already been conducted *three* times — by the guardian ad litem (Professor Eric Green) appointed by the District Court to review the fairness of the Global Settlement from the class's standpoint, by the District Court and by the Fifth Circuit — and there is no cause for yet a fourth look by this Court.**

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* Here and throughout, moreover, petitioners suggest that this class is somehow additionally suspect because it contains future claimants. Indeed, petitioners flatly state that "the settlement releases *future* claims for which no representative could *ever* be considered typical." Pet. 14 (emphasis in original). These assertions are unadorned by analysis or citation, and are belied by both. Classes containing "future" claimants grew out of the ages-old practice of permitting representatives to litigate and settle actions on behalf of unborn heirs or other future interests (such as those regarding trusts), *see, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *McArthur v. Scott*, 113 U.S. 340, 401-02 (1885). Class resolutions on behalf of future schoolchildren, future prisoners and future housing tenants are accordingly a familiar part of modern jurisprudence, necessary to avoid constant relitigation. What matters is that class members share an identity of interests — not, as petitioners would have it, that all their precise identities be known.

** Petitioners' oblique suggestion that the Court should grant review

(Cont'd)

II. PETITIONERS' CONTRIVED ARTICLE III "ISSUE" DOES NOT WARRANT REVIEW BY THIS COURT.

The Article III "issue" raised in the petition is at odds with settled law and does not warrant review by this Court.* Although derisively referring to this case as a "contrivance between friends" and a "joint venture, not an adversarial lawsuit" (Pet. 16-17), petitioners concede that there was a real controversy among the class, Fibreboard and the insurers before the Global Settlement was reached. Pet. 16.** Their contention, however, is that "[h]ow much

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because it is allegedly not possible ever to give adequate notice to "futures" (Pet. 15) ignores settled law that due process requires only the "best notice practicable" where future claims are involved. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). Petitioners do not contend that the notice campaign here — the most expensive in history — did not meet this standard. Moreover, as petitioners concede (Pet. 15 n.6), the provision of notice here was not complicated by any need by class members to make an immediate opt-out decision. Indeed, the supposed constitutional defects in the provision of notice here would equally have invalidated the provision of notice in the *Rudd* action regarding the Trilateral Agreement; yet petitioners affirmatively argued that the provision of notice there was constitutional.

* The petition's repeated suggestions that this "issue" is to be decided in *Amchem* are misleading. The Court granted certiorari in *Amchem* only on the Rule 23 questions addressed by the Third Circuit. That petitioners' counsel — respondents' counsel in *Amchem* — chose to raise a perceived Article III issue in their brief in that case rather than defending the rationale adopted by the Third Circuit does not mean that this case should be held for *Amchem* simply because counsel has raised the same "issue" here.

** Petitioners could hardly argue otherwise: as the Fifth Circuit and District Court found, class members, Fibreboard and the insurers obviously had conflicting interests regarding Fibreboard's claimed insurance coverage and the payment of class members' claims. This is in sharp contrast to the cases cited by petitioners, in which the parties' interests were never in conflict. *See Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971); *United States v. Johnson*, 319 U.S. 302, 304 (1943); *Muskrat v. United States*, 219 U.S. 346, 361 (1911); *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 180-81 (1905).

struggle took place *before* the pleadings were submitted to the district court . . . proves nothing about the existence of a justiciable controversy *in that* court" (*id.* (emphasis in original)): in other words, that an indisputably real controversy is transformed into an unconstitutional "joint venture" where the terms of a settlement are reached prior to the filing of the complaint.

Settled law has dismissed this proposition ever since this Court's decision in *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), rejected an identical Article III objection to a consent decree that was likewise reached prior to the filing of a complaint and was then presented to the District Court for approval concurrently with the filing of a complaint. *Swift*'s holding has been uniformly applied by the courts of appeals, and such consent decrees (and related settlements such as pre-packaged bankruptcies) have become a regular and salutary practice by which parties can resolve their differences without first instituting costly and often compromise-inhibiting litigation while not forfeiting the ability to obtain judicial oversight of issues that may arise.* There is no reason for the Court to revisit this issue.

Nor is there any plausible distinction of *Swift* (the petition does not even make the attempt). To the contrary, *Swift*'s holding applies *a fortiori* in this class action context, because Fed. R. Civ. P. 23(e) affirmatively *requires* court approval of class settlements. Indeed, precisely because of this approval requirement, this Court has held that the existence of a class settlement does not spell the end of an Article III controversy until approval is received. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 n.10 (1982). And the effect of petitioners' argument on class actions would be absurd. In addition to invalidating the practice of consent decrees and pre-packaged

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* *See, e.g., SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977); *see also* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530, at 320 (noting that Article III is satisfied in such situations because, in "[c]ases involving genuinely adversary interests, but lacking any dispute as to facts or remedy . . . . [t]here may be a very real need to secure a judicial decree to establish status or rights, or assist in their enforcement, even though there is no present dispute").

bankruptcies, petitioners would institute a regime in which potential class litigants would be well advised not even to talk prior to litigating, for if such talk led to the misfortune of the parties agreeing on a settlement before a complaint were filed, they would have *ipso facto* rendered it impossible to proceed. Article III, as petitioners would have it, would operate to foreclose any means of obtaining the required court approval.

III. THIS CASE DOES NOT PRESENT ISSUES RAISED IN *ADAMS V. ROBERTSON.*

Nor does this case present the questions the Court was unable to reach in *Adams v. Robertson. Adams* involved the issue whether state rules of procedure may constitutionally provide for certification of a mandatory class action where there is no claim by the parties that affording opt-out rights would prejudice class members' claims. Here, by contrast, petitioners do not contest that the plain language of Fed. R. Civ. P. 23(b)(1)(B) calls for a unitary resolution on the facts of this case, or that many class members would be severely prejudiced and potentially recover nothing on their claims if opt-outs were instead permitted. *See* pp. 11-12, *supra.*

The upshot of petitioners' due process argument, unlike that in *Adams*, is thus twofold: *first*, that this Court should hold — for the first time ever — that an intended application of a Federal Rule would be unconstitutional, and that "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule [does not] transgress[ ] . . . constitutional restrictions" (*Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); and *second*, that the federal courts are constitutionally foreclosed from achieving a unitary resolution whenever the class asserts "*in personam*" claims (Pet. 18), no matter how draconian the consequences to the class. Unlike the novel issues at stake in *Adams*, both of these implausible arguments fly in the face of settled precedent, and this Court's review is not warranted.

1. As detailed in the Fifth Circuit's opinion, centuries of jurisprudence establish that opt-out rights are not constitutionally required where "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the

parties affected," so long as those parties were "adequately represented." App. 49a. These "equitable circumstances," moreover, may exist notwithstanding that the class is seeking monetary damages.

For example, in *Smith v. Swormstedt*, 57 U.S. [16 How.] 288 (1853), this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interests" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be achieved only through a unitary resolution. *Id.* at 302-03; *see also Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670-72 (1915) (unitary resolution of money damages claims appropriate where necessary to protect class members' "common interests" and to avoid "destructi[on] of their mutual rights"). Likewise, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310-14 (1950), this Court rejected an identical due process challenge to a unitary resolution of *in personam* money damages claims arising out of alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust.*

2. These precedents of this Court, moreover, reflect an even longer common-law tradition of unitary class resolutions of monetary claims where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* (1950), at 285. And it was well recognized that the circumstances permitting a

* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement encompassing absent and future parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11. The Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them among class members. *See Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good v. Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same).*

3. Contrary to petitioners' unsupported assertions, moreover, the settled validity of unitary class resolutions of monetary claims is not limited to "*in rem* cases." Pet. 19. *Not a single case* even suggests, much less adopts, this supposed *in rem*/*in personam* distinction.** To the contrary, this Court flatly rejected the "distinction" in the sole case in which it was proposed. In *Mullane*, the petitioners likewise claimed that a unitary resolution violated their due process rights to the extent it encompassed *in personam*, as opposed merely to *in rem*, claims. The Court, however, squarely held that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon [this] classification. . . . Without disparaging the usefulness of distinctions between actions

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* Other examples of unitary class resolutions of monetary claims at common law include *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676) (mandatory bill of peace to determine the size of payments owed to a parson by his parishioners); *Brown v. Booth*, 21 Eng. Rep. 960 (Ch. 1690) (same); *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722) (mandatory class action brought by one proprietor of a business as representative of "all other proprietors and partners" against the former treasurers and managers of the business for several "misapplications" totalling £50,000); and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805) (mandatory class action to recoup alleged rent overpayments under a contract to which numerous persons were parties).

** Indeed, many of the cases discussed above involved classically *in personam* claims: for example, *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S at 311-14); *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds as a matter of contract interpretation (57 U.S. at 302); *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims against the managers of a business; and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805), involved alleged rent overpayments under a contract.

in rem and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." 339 U.S. at 312-13.

Nor do petitioners explain the supposed significance in this context of their *in rem/in personam* "distinction." In particular, class members here needed a unitary disposition in order to secure a fund to compensate them in the first place; allowing opt-out rights would have forced the coverage litigation to proceed, and put at risk the only source of meaningful recovery. Class members here were thus *more* in need of a unitary resolution than are typical *in rem* claimants: at least the *res* in an *in rem* case will still exist absent a unitary resolution (though it may be distributed inequitably).*

4. A long line of precedent thus establishes that federal courts may achieve a unitary resolution where necessary to protect the class, and rejects petitioners' notion that individual class members have an absolute constitutional right to pursue a windfall recovery where their doing so would irretrievably prejudice their fellow class members' claims. These precedents supply ample basis to sustain the judgment of "the Advisory Committee, this Court, and Congress" in adopting the identical approach in Rule 23, and to sustain the

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* The dissent below also contended that the historical practice of unitary resolutions of monetary claims was limited to circumstances where class members' individual claims were themselves equitable in nature. App. 95a-98a. This argument likewise flies in the face of precedent. In *Smith v. Swormstedt*, this Court made clear that the power of "a court of equity" to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation." 57 U.S. at 303 (emphasis added). Similarly, at common law, it was "immaterial" to the propriety of a unitary resolution whether "the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *Adair*, 32 Eng. Rep. at 1159 (describing the practice as allowing "a person, having *at Law* a general right to demand service from the individuals of a large district . . . [to] sue thus in Equity," and as requiring only that enough of the individual class members be brought into court "that it can be said, they will fairly and honestly try the *legal* right between themselves, all other persons interested, and [the party opposing the class]") (emphasis added).

Fifth Circuit's application of that Rule's plain language in this case.

Rule 23(b)(1)(B), as the Fifth Circuit explained, is the present-day equivalent of the traditional class actions discussed above (App. 47a-48a); it likewise makes the propriety of a unitary disposition turn on the need to protect class members rather than on the specific type of relief class members seek.* By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(3).**

5. Nor does *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a sentence fragment of which supplies petitioners' sole claimed support for their position (Pet. 18), call the decision below into any question.

a. *Shutts* does not bear at all on petitioners' principal argument — that class members here have an absolute right to opt out no matter what their contacts with Texas. As the Court recently explained in *Adams*, *Shutts* pertains only to the question whether a "state court lacked personal jurisdiction over out-of-state class

* The Advisory Committee Notes to Rule 23(b)(1)(B) specifically refer to *Smith v. Swormstedt* as an example of an action falling within that Rule. *See* Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B). The remaining subsections of Rule 23(b)(1)-(b)(2) set forth other circumstances in which potential prejudice to the class or the defendant arising from opt-out rights necessitates unitary resolutions.

** In fact, "[o]pt-out class actions were unheard of before the 1966 amendments to the Federal Rules of Civil Procedure created the Rule 23(b)(3) opt-out class action." App. 49a n.16. To the extent Rule 23(b)(3) class actions are traceable to any prior procedure, it is not to the traditional class action but to the "spurious" class action first created in 1938 by original Rule 23, which fashioned what was essentially a permissive joinder device, binding class members only if they affirmatively opted *into* the class. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).

members, not the different and broader question of whether . . . due process requires that all class members have a right to opt out" even if they are subject to personal jurisdiction in the forum court. *Adams*, 1997 U.S. LEXIS 1490, *7 (1997).

b. For three separate reasons, *Shutts* also does not support petitioners' fallback position that this Court should review whether, in a class action such as this one, opt-out rights must be given to class members "who lack minimum contacts with the forum state." Pet. 19.

First, as the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (App. 47a) — that is, the class was certified merely for litigation convenience, and there was no issue that allowing opt-out rights would prejudice class members' claims. The Court's holding requiring opt-out rights in that context therefore did not alter the settled validity of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution does exist — as typified by the Court's prior decisions in *Smith* and *Mullane*, both of which explicitly upheld mandatory class actions incorporating class members who lacked *any* contact with the forum state. *See Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303. For this reason, the *Shutts* opinion was limited to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3.*

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* As the Fifth Circuit explained, far from invalidating Rule 23(b)(1)(B)'s plain language, *Shutts* thus recognized the basic distinction made in Rule 23: unitary resolutions are permitted of those actions that fall within the federal courts' authority to fashion "equitable relief" to protect the class — class actions under Rules 23(b)(1)-(b)(2); opt-out rights are required otherwise. App. 49a & n.16.

By contrast, the two cases that petitioners claim conflict with the decision below each arose out of the same class action, in which a mandatory class was certified with respect to a "hybrid" suit involving both equitable relief and "*foreclosure* of substantial damage claims" where there were no

(Cont'd)

Second, *Shutts* — whose holding was expressly limited to class actions involving "known plaintiffs" (*id.*) — by its terms has no applicability to this futures class action. "Futures" classes such as this one aimed at improving the conditions all class members will ultimately face, but which will not liquidate their individual recoveries, are uniquely suited for mandatory class treatment. In this way, this case resembles the mandatory class actions routinely brought on behalf of future schoolchildren and future prisoners. *See* p. 17 n.*, *supra*. By contrast, a "front-end" right to opt out may be of limited practical utility to futures class members, many of whose injuries are not yet manifest. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). Far more efficacious in a real world is the absolute right to exit to the tort system that the Global Settlement *does* afford to any and all class members dissatisfied with the result of the trust settlement mechanism. *See In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Finally, *Shutts* involved a class action brought in *state* court, and has no bearing on this *federal* class action. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to

(Cont'd)

circumstances requiring unitary resolution of the damage claims. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (emphasis added), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994); *In re Real Estate Title*, 869 F.2d 760, 768 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). Putting aside whether the underlying certification of a mandatory class in that action was proper under the Rule, these cases are plainly distinguishable from this case, where there was an overriding need for a unitary resolution to ensure a source of recovery for the class and in which the individual damages will not be adjudicated. Indeed, the Third Circuit specifically noted that it was not "address[ing] the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief." *Real Estate Title*, 869 F.2d at 768 n.8. By contrast, where there is a need for unitary resolution, courts — including the Ninth and Third Circuits — have uniformly held that *Shutts* does not impose a constitutional opt-out requirement. *See, e.g., Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994).

assert jurisdiction nationwide. *See, e.g., United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878); *Semegen v. Weidner*, 780 F.2d 727, 730 (9th Cir. 1985).*

IV. PETITIONERS' REMAINING CONTENTIONS ARE NOT CERTWORTHY.

The final section of the petition presents a grab-bag of complaints that the certification of a mandatory class in this particular case violated Rule 23 and a variety of statutes. None merit this Court's attention.

1. Petitioners' *ipse dixit* that the class was "eligible . . . for class treatment only under Rule 23(b)(3)" (Pet. 21) presents no conflict in the circuits or any other cause for this Court's review. To the contrary, petitioners nowhere dispute that the decision below was fully consistent with the plain language of Rule 23(b)(1)(B). *See* pp. 11-12, *supra*. And their selective quotation of the 23(b)(1)(B) Advisory Committee Notes — designed to create the impression that those Notes limit the Rule's operation to "*in rem* claims 'made by numerous persons against a fund insufficient to satisfy all claims' " (Pet. 21) — carefully excises the Notes' statement three sentences later that the Rule is in fact to operate "in the *absence* of a fund either present or potential." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (emphasis added).

Moreover, petitioners' claim that the Fifth Circuit's reason for 23(b)(1)(B) certification here "is akin to that present in *every* settlement" (Pet. 22) is based upon an absurd caricature of the opinion below. The Fifth Circuit did *not* certify "a limited fund class based on the settlement's creation of that very fund." Pet. 23. Rather, it recognized that, absent a unitary resolution, the class's source of recovery would potentially be lost for reasons *unrelated* to the merits of the class's claims: through a potential Fibreboard loss in the coverage litigation. App. 42a. This holding, as the District Court explained, does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a

* Accordingly, plaintiffs are routinely shuttled through the federal court system under 28 U.S.C. § 1404 to districts with which they have no contacts at all. *See, e.g., Norwood v. Kirkpatrick*, 349 U.S. 29, 30-32 (1955).

defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). App. 198a-199a.

2. The historical practice set forth above disposes of petitioners' Rules Enabling Act argument (an argument for which petitioners cite no authority at all, much less a circuit conflict). The appropriateness of unitary resolutions of monetary claims where necessary to protect the class dates back centuries. *See* pp. 20-27, *supra*. There thus can hardly have been a contrary "substantive right" to opt out in such circumstances in 1938, when the Enabling Act was passed, and there can hardly be such a right now. Indeed, the predicate of petitioners' contention — that each class member has a "substantive right" to full individual recovery where seeking it would irretrievably prejudice the rest of the class's claims — does not begin to overcome the heavy presumption that the Rule's plain language does not "transgress[ ] . . . the terms of the Enabling Act." *Hanna*, 380 U.S. at 471.

3. Finally, as the Fifth Circuit explained in detail, there is no conflict with the Bankruptcy Code or with *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993). App. 41a-46a. As noted above, class members could not have put Fibreboard into bankruptcy in August 1993, when the Global Settlement was reached, without first forcing it to continue (and potentially lose) the coverage litigation. *See* p. 12, *supra*. Petitioners' notion that the Fifth Circuit "substitute[d] a mandatory class action settlement for bankruptcy" (Pet. 24) is thus yet another example of the dramatic license they have taken with the facts of this case.

Keene, by contrast, is different on every level. There, a former asbestos manufacturer tried to evade an immediate and otherwise unavoidable bankruptcy through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it where no settlement existed at all. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and

expressly did not decide the propriety of Rule 23(b)(1)(B) certification (*see id.* at 728, 730 & n.1, 733); the portion of its opinion relied upon by petitioners is, in the Fifth Circuit's words, a "gratuitous discussion" and does not amount to a conflict warranting this Court's review. App. 41a, n. 14. (In contrast, on the occasions that the Second Circuit has actually *decided* the issue — including one decision *subsequent* to *Keene* — it has squarely held that Rule 23(b)(1)(B) may properly be applied in the case of an insolvent entity. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).)

Even the *Keene* dictum, however, does not avail petitioners. *Keene* involved a situation where, unlike here, class members *could* put the former asbestos manufacturer into bankruptcy immediately and *would* be fully protected there. Quite the opposite is true here: as the Fifth Circuit found, a potential Fibreboard bankruptcy "would be too late for [class members]" (App. 45a) — who would get, at a very minimum, over $1 billion dollars less in bankruptcy than they would under the Global Settlement — and requiring them to "wait until catastrophe be[fell] . . . them as a result of the California litigation would be a denial of justice . . . and unwarranted by the law." App. 42a-43a. Indeed, the Bankruptcy Code expressly authorizes the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be "better served." 11 U.S.C. § 305(a)(1).

CONCLUSION

Respondents recognize that the Court has expressed interest in the issue whether a mandatory class may be certified, as in *Adams* (and previously in *Ticor Title Ins. v. Brown*), because equitable and damages claims co-exist in a single litigation, because a settlement seeks to provide class members with equitable remedies for their money damages claims or because a settlement would be more efficient than individual suits for damages. But much as petitioners attempt to present this case as involving those issues, it does not. The decision below was not based on the projected efficiencies of a

scheme of alternate dispute resolution or on a desire to find a "better way"; it was based on a very real need to protect this class from losing its only chance at recovery. The principal issues actually presented here have thus been settled for hundreds of years, and there is no reason for this Court to revisit them. For the foregoing reasons, the petition should be denied.

Dated: March 31, 1997

Respectfully submitted,

Paul J. Bschorr
Richard B. Sypher
David F. Owens
DEWEY BALLANTINE
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Counsel for Respondent Pacific Indemnity Company

Herbert M. Wachtell*
Meyer G. Koplow
Jeffrey M. Wintner
Meir Feder
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Counsel for Respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company

* *Counsel of Record*

Additional Counsel for Respondent Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company:

Rodney L. Eshelman
Donald T. Ramsey
CARROLL, BURDICK
& MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

Stuart Philip Ross
Sean M. Hanifin
Merril J. Hirsh
ROSS, DIXON & MASBACK, L.L.P.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

Otis Carroll
Bill Parker
IRELAND, CARROLL
& KELLEY, P.C.
6101 S. Broadway, Suite 500
Tyler, TX 75703
(903) 561-1600

Additional Counsel for Respondent Pacific Indemnity Company:

John H. Minton
Michael E. Jones
POTTER, MINTON, ROBERTS,
DAVIS & JONES, P.C.
P.O. Box 359
Tyler, TX 75710
(903) 597-8311

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No. 96-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT FIBREBOARD CORPORATION

Kelly C. Wooster
Counsel of Record
Stephen M. Snyder
William R. Irwin
Thomas M. Peterson
Laura J. Remington
Michael B. Green
BROBECK PHLEGER & HARRISON LLP
Attorneys for Respondent
Fibreboard Corporation
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 442-0900

70875
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

CORPORATE DISCLOSURE

Respondent Fibreboard Corporation is a corporation. It has no parent company, and it has no nonwholly owned subsidiaries.

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Fibreboard Corporation submits this opposition to the Petition for Writ of Certiorari filed by Ortiz, *et al.*

PRELIMINARY STATEMENT

The heart of this case is the resolution in 1993 of a unique insurance dispute that had been litigated intensively for almost fifteen years. Without the insurance there was no money for the class. The way to eliminate the risk that there would be no insurance money was for the class, Fibreboard, and the insurers to settle.

Hard economic facts underlay this case. Fibreboard, without asbestos-related liabilities, was worth at most $235 million. By 1993, it had incurred debt on asbestos settlements of $1.2 billion, enough in itself to wipe out Fibreboard five times over. This does not take account of then-pending but unsettled claims, let alone the unfiled claims of what became the *Ahearn* "futures" class.

However, Fibreboard also had two insurance policies, together spanning less than three years. Pacific Indemnity's policy covered one year, May 1956 to May 1957, and Continental Casualty Company's policy followed, for 22 months, ending in March 1959. The California trial court had determined that these policies contained no aggregate limits, so they would not be exhausted no matter how many claims were paid, and that they afforded full coverage for *all* claims with exposure to asbestos before the end of Continental's policy.

The insurers had taken appeals and the issues were substantial. There was a significant risk that the appellate court would decide that the policies, in force for less than three years ending in 1959, did not cover asbestos exposures dating back to the 1930's, and claims being presented in the 1980's and 90's. A loss on any one of several issues on appeal would destroy any significant insurance coverage under the policies.

Given the economics, whether asbestos claimants, including

those within the *Ahearn* class, received any compensation depended wholly on the outcome of the insurance coverage case. As a legal proposition, those claimants possessed interests in the policies under such cases as *Shapiro v. Republic Indemn. Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).

In August, 1993, as the California Court of Appeal was about to hear the final set of arguments in the coverage case, the three distinctive interests in this case — the claimants, the insurers, and Fibreboard — entered into a settlement which eliminated the enormous risks to insurance coverage. The insurers agreed to pay over $1.5 billion into a trust fund to compensate the *Ahearn* class members, who were those claimants who had not then sued or settled with Fibreboard. Consistent with an earlier, April 9, 1993 agreement between Continental and Fibreboard, obliging those parties to attempt to accomplish a global settlement of *all* claims, that settlement covers both insured claims, and claims that were never insured, under any interpretation, of either policy. The insurers also committed to resolve all the already-settled claims, and those filed but not settled, at an anticipated cost of an additional $1.5 billion plus.

Under the settlement for the *Ahearn* class members, each member controls his or her claim. There are no pre-set values or ranges to be paid on claims. No single claim is resolved. A class member dissatisfied with the trust's settlement offer may, at his or her election, proceed to binding arbitration, or to non-binding arbitration followed by a jury trial in court (App. 560a)[1] (an option omitted from petitioners' description of claimants' rights, p. 7).[2]

The essence of this case, then, is that the class members eliminated a significant risk, common to all, that the contingent insurance assets, in which all possessed a common interest, would

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1. Citations to the Ortiz petitioners' Appendix are "App. __." Fibreboard's Appendix is cited as "FA __."

2. Subject to generous limits on recovery designed to preserve the fund for later claimants, for example, a cap of $500,000 per claim.

be lost. The class liquidated that asset, for an enormous sum that no one argues was unfair, and appropriated it entirely to itself, to be shared equitably among class members. The necessary trade-offs were that the insurers — having settled their coverage liabilities — are protected, and Fibreboard — having developed and turned over to claimants all of the enormous insurance assets — is protected as well.

Even the dissent below expressly conceded, and petitioners do not contest, that this case fits under Rule 23(b)(1)(B). The case is not, as petitioners claim, a legislative reform of the tort system. It does not furnish any road map for other defendants faced with mass tort or other claims. The record here does not support petitioners' characterizations of the case, and hence does not supply any basis for the multiple-part question petitioners say is presented.

Finally, petitioners point to an insurance settlement which they assert was reached independently and which itself removed the coverage case risk. But the record shows that the insurance settlement was not reached independently at all, it was entered into after — and purely in connection with — and as a backup to the global settlement, and all earlier efforts to achieve a separate insurance settlement had failed miserably. The negotiators simply did not have any insurance settlement when they reached agreement on a global settlement. The insurance settlement, which petitioners themselves support as "highly beneficial for" and "in the best interests of" asbestos victims, in fact returns far less money to the claimants than the global settlement. And the insurance settlement was confirmed through a mandatory class action consisting of the same *Ahearn* class members involving the same interests in the same insurance policies, all of which petitioners embraced, as was the global settlement, which they here challenge.

In sum, this case is not what petitioners say it is, a clone of *Amchem Products* and *Adams*. It is highly unique on its facts, which bring it squarely within both the language and the intent of Rule 23(b)(1)(B). Fairly presented, the record will not support what petitioners represent to the Court; it will support what we say in

this brief and what the courts below found. *See* Rule 15.2. As such, the case presents no issues warranting review by this Court.

STATEMENT OF THE CASE

A. Fibreboard's Unusual No-Limit Policies Were The Only Potential Source Of Recovery For The Class.

From 1920 to 1971, Fibreboard manufactured asbestos-containing products as a diversification from its primary business, which was timber. (App. 4a, 226a). This product line placed Fibreboard squarely in the middle of asbestos products liability litigation. It has been there since the start. *See, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

Fibreboard has always been a company of modest size. In 1995, Fibreboard's net worth, assuming no asbestos liabilities, was at most $235 million. (App. 343a). In earlier years, when Fibreboard was trying to confirm insurance for its escalating asbestos liabilities, the market valued Fibreboard at as little as $10 million. (App. 243a).

Given its limited assets, Fibreboard needed insurance coverage in order to defend and pay asbestos personal injury claims. Fibreboard and other companies with asbestos liabilities litigated coverage for these claims against dozens of insurance companies in a California state court. This coverage litigation was "one of the largest and most complex in the history of American civil jurisprudence . . . .". (App. 233a). It began in 1979 and, after massive pretrial discovery and a multi-phased trial, ended with a trial court judgment entered in January 1990. (App. 233a-235a).

While the insurance coverage case was pending, Fibreboard reached a settlement with a number of insurers as a part of Fibreboard's entry into the multi defendant and insurer Asbestos Claims Facility ("ACF") in 1985, where Fibreboard remained until 1988. (App. 228a-231a). In 1988, when Fibreboard's relationship with the ACF ended, Fibreboard found itself in a predicament: Fibreboard continued to be sued by increasing numbers of persons

alleging asbestos product liabilities;[3] yet, its participation in the ACF had exhausted all but two of its insurance policies.[4]

Those two policies are at the crux of this case. Both were heavily involved in the California state court coverage litigation. First, although it was unable to locate a copy of the policy, Fibreboard contended that Pacific Indemnity Co. had issued a primary liability policy to Fibreboard for one year spanning 1956 to 1957 and that this policy had no aggregate limit on the total amount it would pay for product claims. Pacific denied issuing the policy and refused coverage. (App. 233a). Second, Continental Casualty Co. had issued a primary policy to Fibreboard that remained in force for twenty-two months, ending on March 15, 1959. Fibreboard did have this policy and, while it had a $1 million "per occurrence" limit and a $500,000 "per claim" limit, the policy did not contain any aggregate limit for products claims (App. 233a). Continental denied coverage under its policy.

B. Fibreboard Obtained Favorable Trial Court Rulings Potentially Providing Extensive Insurance Coverage.

Many of the asbestos claims against Fibreboard arose out of exposures (*e.g.*, at World War II shipyards) prior to the mid-50's. (App. 226a-228a). Given the long "latency" period for the development of asbestos-related disease, asbestos claims did not start being filed in large numbers until the 1970's and 1980's. (App. 219a). Fibreboard needed to establish that the Pacific and Continental 1956-1959 policies covered these claims, even though the exposures may have pre-dated the policies and the lawsuits were filed many years after the end of the policy periods.

First, however, Fibreboard had to, and did establish the

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3. Indeed, Fibreboard's participation in the ACF had, if anything, increased the rate at which Fibreboard was sued as a defendant by claimants. (App. 231a).

4. The only other insurance funds consisted of approximately $100 million remaining from settlements with two excess insurers with whom Fibreboard had settled separately from the ACF settlement. (App. 232a).

existence and terms of the Pacific policy. A jury found that Pacific had issued the policy to Fibreboard, and by a minimum 9 to 3 vote determined that the policy had no aggregate limit on the amount of claims it would pay. (App. 234a).

On the common coverage issues, the trial court in 1987 ruled that there was coverage under every policy between the time of an asbestos claimant's initial exposure and the time suit was filed, *i.e.*, that each of these policies was "triggered" with respect to the claim. (App. 234a). *See Armstrong World Industries v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 43-45, 52 Cal. Rptr. 690, 702-03 (1996). The trial court also ruled, on the "scope" issue, that every triggered policy had a full, independent obligation to pay for all of the costs of defense and indemnity on a claim, up to the amount of the policy limit, even though the policy was only in force for a portion of the total period of time that elapsed between the plaintiff's first inhalation of asbestos and suit. (App. 234a-235a).

Finally, in 1988, the trial court rejected an argument by Continental that under the "occurrence" definition in its policy, all of the asbestos claims constituted just two "occurrences" (corresponding to the two Fibreboard plants which were the source of asbestos-containing products), and hence its total liability under its policy was $2 million. The trial court found, instead, that each individual asbestos claim constituted a separate "occurrence". (App. 235a).

These rulings, in combination, exposed Continental and Pacific to enormous potential liability, and gave Fibreboard a chance of surviving the relentless asbestos litigation on the strength of these two policies. If a plaintiff inhaled asbestos at any time before the Continental policy lapsed (March 15, 1959), Fibreboard could look for coverage under at least one of the Continental and Pacific policies; and those policies never could be exhausted.

The trial court's rulings also had the effect of making the coverages under the Pacific and Continental policies essentially

duplicative of each other. The Pacific policy would be triggered by any claim involving exposure to asbestos prior to May 1957, and responsible up to its $500,000 per person limit. The same was true of the Continental policy for any claim involving exposure at any time prior to March 1959. Fibreboard characterized claims covered by the two policies as "pre-1959 claims".

Neither the Pacific nor the Continental policy covered any claim where first exposure to asbestos occurred after March 15, 1959, the expiration of Continental's policy.[5] These "post-1959 claims" had to be dealt with. As noted, Fibreboard had some $100 million available for these claims from its settlements with excess insurers, but it needed more. (App. 231a-232a). The solution lay in the duplicate coverage provided by the two no-aggregate policies. Fibreboard and Pacific reached an agreement to rescind the Pacific policy. In return, Pacific agreed to make funds available for post-1959 claims. The amount payable by Pacific would range from zero to $330 million depending upon appellate rulings in the coverage case. The largest portion of the settlement ($225 million) was also contingent on Fibreboard obtaining a judicial determination that the settlement and related rescission eliminated Continental's right to obtain contribution from Pacific on pre-1959 claims paid by Continental. (App. 250a-251a).

C. The Insurers Appealed Raising Substantial Issues.

Continental and Pacific appealed from the trial court's January 1990 judgment. For Fibreboard, it was critically important to sustain all of the court's rulings. Reversal of either the trigger or scope ruling would virtually destroy coverage. A reversal of the jury's no-aggregate limit verdict on the Pacific policy would leave Fibreboard with only the minimum amount payable under the Pacific settlement. A reversal on the trial court's decision on the "occurrence" definition would leave Fibreboard with only $2 million of coverage under the Continental policy.

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5. The Petition, page 3, states that Fibreboard had "the possibility of unlimited insurance coverage in the future." That is incorrect.

On the trigger issue, some appellate courts had found coverage only under policies in effect during the time a claimant was exposed to asbestos.[6] Others had limited coverage to the policy in effect when the injury resulted in a manifest asbestos disease.[7] Thus, for example, if a plaintiff working in a World War II shipyard inhaled asbestos, went to college after the war and took a white-collar job thereafter, never to encounter asbestos again, and then became sick in 1985, the Continental and Pacific policies would not cover such a claim under either theory because there was no exposure and no manifest disease during the years 1956 to 1959. By contrast, under the California trial court judgment, the Continental and Pacific policies both provided coverage.

Rulings on the scope issue had differed too. Some courts had found that where multiple policies are triggered for a claim, each policy is required to pay only a pro rata portion of the costs of the claim. *E.g., Ins. Co. of North America v. 48 Insulations, supra.* Some of these courts also required the insured to pay a pro rata portion of the costs for periods of no insurance or exhausted insurance. *Id.* Either theory would have gutted the coverage available under the Continental and Pacific policies.

The district court in this case expressly found, based upon expert testimony, that there was a significant risk that Fibreboard would lose one or more of the critical issues on appeal. (App. 241a). And Fibreboard had no margin for error. Any loss, on any issue, would be a disaster, both for Fibreboard and for the asbestos claimants. In the summer of 1993, the California appellate court held arguments on the appeal of the Coverage Case, with the last of them scheduled for August 27. (App. 236a). At that argument, the Court announced that it expected to issue its opinion soon thereafter. (App. 236a).

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6. *E.g., Ins. Co. of North America v. Forty-Eight Insulations,* 633 F.2d 1212, 1218-1220 (6th Cir. 1980), *clarified,* 657 F.2d 814, *cert. denied,* 454 U.S. 1109 (1981).

7. *E.g., Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.,* 682 F.2d 12, 25 (1st Cir. 1982), *cert. denied,* 460 U.S. 1028 (1983).

D. The Plaintiffs Looked To Fibreboard's Insurance Assets.

As it left the ACF in 1988, Fibreboard lacked the cash needed to pay the ever-escalating liabilities presented by claimants in the asbestos litigation, but it recently had gained favorable coverage rulings in the trial court. Accordingly, Fibreboard developed the "Structured Settlement Program," or "SSP." Fibreboard agreed to settle cases with claimants by deferring immediate cash payments on anywhere from 60 to 100 percent of the amount of the settlement, pending the outcome of the coverage litigation. These settlements contained restrictions on Fibreboard's corporate activities, to ensure plaintiffs that if Fibreboard lost the coverage litigation they would at least have the company as a recourse. (App. 243a-245a). The SSP found acceptance among plaintiffs, although settlement values increased, given the risk of non-payment. (App. 245a).

The plaintiffs' asbestos bar understood that the only hope for significant payments from Fibreboard depended on victory in the coverage litigation. Indeed, plaintiffs' counsel in the asbestos personal injury cases kept themselves well informed of developments in the state insurance coverage appeal. (App. 264a; FA 27a-28a; Tr. 643-644, 903). Steven Kazan, a prominent California asbestos lawyer, was optimistic about Fibreboard's prospects in the Court of Appeal, but privately was "scared to death" about the chances in the California Supreme Court. (FA 29a; Tr. 911-912).

However, the SSP proved unworkable for the settlement of large groups of cases. (App. 247a). Fibreboard found itself in consolidated trials in Texas, West Virginia, Baltimore, and New York, and ran out of defense money because its defense costs exceeded the amounts provided for in a 1988 interim agreement with Continental and Continental refused to pay more. (App. 247a-248a). Consequently, in early 1991, Fibreboard started settling claims by paying no money, but agreeing upon dollar values on the claims. For pre-1959 claims, Fibreboard then assigned to the settling plaintiff a right to a share of the proceeds from any recovery under the Continental policy; for post-1959 claims, settling plaintiffs

continued to receive SSP's. (App. 251a). Again, Fibreboard agreed to keep the company intact as a recourse in the event it lost its insurance coverage. (App. 252a).[8]

"Assignment" settlements were for substantially larger amounts than the SSP settlements ($11,400 average v. $5,400 average). This occurred not only because any payment was subject to the risk of an unfavorable outcome in the state insurance litigation appeal. In addition, Continental vehemently objected to the assignments, contending that they were invalid and vitiated coverage by breaching cooperation clauses in the Continental policy. (App. 252a). Considerable litigation between Fibreboard and Continental ensued over the validity of these assignments. (App. 253a-257a). The assignment settlements were particularly "unfriendly" to Continental, as Continental was faced with the prospect of eventually having to pay for a large number of settlements at ever-escalating values which Continental had no say in negotiating. (FA 20a-21a, 30a; Tr. 231-232; 1325-26). By January 1993, the individual assignment settlements totaled almost $1 billion, including a $260 million settlement of 20,000 cases with the Ness, Motley law firm. (App. 268a-269a).

E. Early Global Negotiations Failed.

As early as 1991, Fibreboard began exploring the possibility of negotiating a complete resolution of the asbestos personal injury litigation. It did this, in large part, because of *Linscomb v. Pittsburgh-Corning Corp., et al.*, an action filed in the district court below in July, 1990. *Linscomb* alleged a Rule 23(b)(1)(B) litigation class action on behalf of present and future asbestos claimants, against Fibreboard and others. (App. 222a, 258a; Fibreboard Trial Exh. 116). Fibreboard felt if it did not nail down a global settlement, it would be prosecuted in *Linscomb* or some other class action. (FA 24a; Tr. 453-454). Fibreboard commenced negotiations with lawyers from the law firm of Ness, Motley, etc. Any global settlement without Ness, Motley involvement would not be credible,

8. Of course, since asbestos claimants were insured creditors, they would share in Fibreboard assets only after its secured creditors were paid.

as even Mr. Baron, counsel for petitioners here, acknowledged. (FA 26a; Tr. 516-517).[9] Steven Kazan and Harry Wartnick, the other lawyers with whom Fibreboard negotiated, were Fibreboard's chief adversaries on the West Coast, were among the most knowledgeable counsel about Fibreboard, and were looked to by other plaintiffs' lawyers for guidance on Fibreboard matters. (App. 259a, 356a). These negotiations excluded Continental, which continued to dispute coverage. (App. 267a). But the global negotiations stalled in late 1991, mainly because of the inability to resolve issues regarding opt-outs and co-defendant contribution and indemnity claims. (App. 266a-267a).

F. Under Pressure, Continental Committed Best Efforts To Accomplish A Global Settlement Covering All Claims.

In 1993, the cumulative effect of the events of the past ten years resulted in an agreement between Fibreboard and Continental which, in turn, led to the global settlement that is the subject of this case.

At the end of 1992, Fibreboard resumed global settlement negotiations with plaintiffs. (App. 271a). This settlement was to be predicated upon an assignment to the plaintiffs of the right to proceeds of the Continental policy.

In January 1993, Fibreboard sued Continental in the district court below, Judge Robert Parker presiding. (App. 269a). This suit sought to validate the assignment that was a part of the massive Ness, Motley 20,000 case settlement (*ante*, p. 10).[10] If successful,

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9. The Ness, Motley firm: controlled over 50% of the asbestos personal injury cases pending around the country, including those pending against Fibreboard (FA 21a; Tr. 303-304); had been involved in virtually all the major trials against Fibreboard (App. 259a); and was on the *Linscomb* class action steering committee. (App. 222a).

10. Fibreboard had obtained a judgment in 1992 from a California Superior Court in Mr. Kazan's *Andrus* case upholding the assignment mechanism, but (Cont'd)

it would bind Continental to all the assignment settlements, past and future. Fibreboard also sought the ruling which was a condition to obtaining $225 million of the Pacific settlement — that Continental could not obtain contribution from Pacific, and thus would have to bear the entire costs of Fibreboard's insured asbestos liabilities. (App. 269a; FA 32a; Tr. 1328-29).

Facing the risks of the outcome in the state insurance coverage appeal, the increasing liabilities represented by the assignment settlements including a potential global settlement, and the litigation before Judge Parker to validate the assignments and insulate Pacific from any contribution obligation, Continental reached with Fibreboard what was called the April 9 Agreement — a seminal event for all the parties. (Fibreboard Trial Exhibit 908). Fibreboard agreed to stop settling cases by assignment of proceeds of the Continental policy. In return, Continental agreed to use best efforts to achieve a global settlement of *all* Fibreboard's asbestos liabilities, present and future, insured and uninsured, all to be paid for by insurance. (App. 274a-275a). This was a commitment Fibreboard viewed, and believed Continental did too, as a standard to which Continental could be held. (FA 22a; Tr. 310)

G. Global Negotiations Finally Succeeded On The Eve Of The Coverage Case Appellate Argument.

Global settlement negotiations followed the April 9 Agreement, under the auspices of Judge Patrick Higginbotham of the Fifth Circuit, who had also acted as a settlement facilitator with respect to the negotiations resulting in the April 9 Agreement. (App. 270a, 286a). The initial negotiations ended in acrimony, with the plaintiffs walking out and declaring negotiations at an end. (App. 278a). Global negotiations did not resume again in earnest until August,

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Continental took an appeal, so the judgment was not res judicata pending final decision. (App. 255a-256a). The California Court of Appeal eventually reversed that judgment, but not until October, 1994, long after the global settlement had been reached. (App. 164a, n. 5).

but they were impeded by the refusal of Pacific to participate in a global settlement. (App. 285a-287a, 290a-291a). Finally, over the weekend of August 22, Pacific agreed in negotiations with Continental to contribute to the funding of a global settlement. (App. 291a). Immediately thereafter, Continental made an offer of $1.3 billion, which plaintiffs' counsel rejected. Continental then offered $1.5 billion, viewing the increase as roughly equal to Fibreboard's value, and offering it because plaintiffs' counsel kept demanding Fibreboard's net worth, which was not on the table due to the April 9 Agreement. (App. Exh. 292a-293a). Plaintiffs' counsel rejected that, too, and precipitated a trip to Judge Parker's court in Tyler, Texas, where the parties convened on August 26. (App. 293a-294a). This was Judge Parker's first direct involvement in the global settlement discussions.[11] The parties finally reached agreement on the settlement price of $1.535 billion on the morning of August 27, the day of the final argument in the coverage case. (App. 294a-295a).

The global settlement eliminated the risk that class members would have no recovery from Fibreboard, either because Fibreboard lost the state insurance coverage appeal, or Continental was able to invalidate the assignment settlement program and destroy any coverage that otherwise might have existed. The district court found it more probable than not that all class claims will be paid at fair and appropriate values, although payment of some may have to be deferred. (App. 325a). Indeed, petitioners have never challenged the global settlement as too little, or as leaving money on the table. (*See post,* n. 12). All claims are channeled to a Trust, controlled by three independent trustees, two of whom the claimants' attorneys select. Each class member's claim will be resolved on its own merits through the Trust procedures. Having settled out their policies, Continental and Pacific are protected from suit. Having given over

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11. The Petition implies that Judge Parker participated intensively in all the global settlement negotiations (p. 4) citing the panel opinion at p. 12a. But the panel opinion there refers only to the discussions on August 26. By then, plaintiffs' counsel already had received a $1.5 billion offer — which they privately had decided was acceptable — but rejected it anyway and held out for more. (App. 293a-294a).

all of its insurance and the significant fruits of a decade of contentious litigation, so is Fibreboard.

H. The Insurers And Fibreboard Agreed To A "Backup" Insurance Settlement, Approved By Way Of A Mandatory Class Action.

At the last minute in the global negotiations, on August 27, plaintiffs' counsel continued to insist upon a backup insurance settlement between Fibreboard and the insurers, to have in place if the global settlement did not achieve final court approval. (App. 295a). This settlement was not actually reached until September, after another series of intense negotiations. (App. 298a-299a).

This back-up insurance settlement provided for $2.0 billion, but that amount is substantially less beneficial to the class. Funds from the backup settlement must be used not only to pay the claims of class members, but also tens of thousands of unsettled non-class claims pending in courts around the country. (App. 320a-321a). Additionally, the backup settlement did not include any money for defense costs, which can equal or even exceed amounts paid for indemnity in mass tort, personal injury litigation. (App. 328a-329; FA 24a; Tr. 379-81).

The petition asserts (p. 4), that the insurers and Fibreboard "independently agreed" to the back-up insurance settlement. Petitioners say the backup settlement, which they affirmatively support,[12] removed the threat that Fibreboard might lose the state

12. The backup settlement, in the view of petitioners' counsel, Mr. Baron, is a "superior settlement," a "great settlement" (FA 17a; Tr. 89), which represents the most the insurers were willing to pay. (Baron Amicus Br., FA 8a). Yet the backup settlement will deliver far less — hundreds of millions of dollars less — to claimants than would the global settlement. (App. 327a-328a). One major difference is that the global settlement caps the contingency fees of plaintiffs' lawyers at 25%, compared to the 33%-40% fees available under the backup. (App. 331a). The same concern about the level of contingency fees prompted

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insurance coverage appeal. They say the backup settlement eliminated the need for the global settlement and the legitimacy of that settlement as a basis for class certification and adjudication by the district court. These assertions are false.

As early as 1988, Fibreboard and the insurers talked about a possible coverage settlement; but it was clear that they couldn't agree to one. (FA 18a; Tr. 172-173). In early 1990, before the inflationary "assignment" settlement program was inaugurated, Fibreboard suggested complete policy settlements of $750 million, in total, with both Pacific and Continental, but Continental declined. (App. 248a; FA 19a-20a; Tr. 185). Again, in the summer of 1993, with the global settlement negotiations at impasse, Fibreboard and Continental discussed the possibility of an insurance settlement. They were not even close. (App. 279a-280a).[13] Rather, the backup settlement came about only because plaintiffs' counsel insisted upon it. (App. 295a, 298a). The insurers took the position, and adhered to it, that they would pay no more for the backup settlement than they would for global settlement. Fibreboard insisted that it needed much

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many filings prior to the injunction in this case. (FA 25a; Tr. 464-65). The Baron & Budd law firm filed some 4,000 cases on August 27, 1993, claiming that they were "present" cases and, therefore, would not be subject to the 25% cap on fees. (FA 35a; Tr. 1505). Similarly, the district court observed that one of the primary objections of the Jaques law firm, which represents petitioners in number 96-1379, was the 25% limit on attorney contingency fees. (App. 151a, n. 2).

13. Meyer Koplow, for Continental, testified that the last meeting "would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. . . ." He "came away with the conclusion not only that it would be a long time before we could put some of the people who had been in the room back in a room together again — given what had taken place that day, but also that there were people on the Fibreboard side who simply would — would never agree to — to the kinds of numbers that Continental might consider paying on a bilateral." (FA 32a-34a; Tr. 1377-79). He saw "no chance" of achieving a separate insurance settlement. (FA 34a; Tr. 1379-80). Stephen Snyder, Fibreboard's lead counsel, testified "it was very clear that we weren't going to be able to do that sort of deal." (FA 22a-23a; Tr. 316-17).

more money with which to pay defense costs. Finally, Fibreboard agreed to the insurers' position, but only as the price of obtaining the global settlement. (App. 295a-296a; FA 23a; Tr. 335-336). It was to get the global that Fibreboard agreed to Continental's terms; "[o]therwise, no way would [Fibreboard] have entered into that settlement." (FA 26a; Tr. 593-94).

Thus, as a matter of fact in this case, there was no backup settlement reached independently of the global. When the global settlement was initially agreed to, there was no other settlement to fall back on and, therefore, the class faced the risk of getting nothing absent the global settlement. Petitioners are not entitled to treat the parties' deal as something it was not, any more than a court can modify a class action settlement to be something it was not. *Cf. Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). This is especially so since petitioners' position, if adopted as law, could make it impossible for parties to settle lest their very settlement be turned against them.

In order to validate the backup insurance settlement, the insurers brought a mandatory class action, *Continental Casualty Co. v. Rudd*, in the district court below against a class of persons virtually identical to the *Ahearn* global "futures" class. The insurers sought, and obtained, not just a declaration that the insurance settlement was fair and reasonable, as the petitioners say, but also a judgment discharging the insurers from any obligation under their policies, and an injunction prohibiting class members from asserting claims against the insurers. In stark contrast to their position here, petitioners supported the *Rudd* mandatory class. They filed an amicus brief in the Fifth Circuit acknowledging the merits of the backup settlement, the standing of the class members with respect to it, and the propriety of the mandatory class. (Baron Amicus Br., FA 4a, 11a-12a). The Fifth Circuit affirmed Judge Parker's judgment in *Rudd* in the insurers' favor. (App. 58a-63a).

REASONS FOR DENYING THE WRIT

I. The Petition Mischaracterizes The Legal And Economic Interests And Risks That The Global Settlement Resolves.

The petition takes a one-dimensional view of this case, as one resolving unaccrued personal injury claims for money damages, many or most of which claims, petitioners say, are not recognized under the laws of various states. (Pet. 2). From this premise flows petitioners' various legal arguments as to why this case is like *Amchem Products*; why variations among class members prevented certification under Rule 23; why the district court lacked power over future claims; why class members should have been allowed to opt out; and why the "limited fund" is somehow a contrivance.

This myopic perspective overlooks the fact that the class had two closely interrelated legal and economic interests: (1) individual asbestos personal injury claims; and (2) an interest under state law in any settlement or compromise of the Continental or Pacific insurance policies.

First, the district court found that each member of the class, including each so-called "exposure-only" claimant, has a good faith basis to argue for application of California law permitting recovery against Fibreboard, located then in California (App. 217a-218a, citing *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993); *Miranda v. Shell Oil Co.*, 15 Cal. Rptr. 2d 569 (Cal. Ct. App. 1993); *Barras v. Monsanto Co.*, 831 S.W. 2d 859 (Tex. App. Houston [14 Dist.] 1992, writ denied).

Second, California law gave all class members legal interests in any resolution of the insurance coverage dispute between Fibreboard and its insurance carriers. Even petitioners recognize that class members were potential third-party beneficiaries of the insurance policies. (Pet. 5, n. 4). And they acknowledged in *Rudd* that these same class members had legal standing with respect to a settlement of the policies. (Baron Amicus Br., FA 11a-12a). California law holds that an injured party (and each class member

has been exposed to asbestos for which Fibreboard may be liable) is a third-party beneficiary of the defendant's liability insurance policy, and his or her interest cannot be altered by independent actions of the insurer and insured. Indeed, under California law, the rights of class members could not be conclusively determined in an action between the insurer and insured to which they were not parties. *See Shapiro v. Republic Indemnity Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).[14] Continental, Pacific, and Fibreboard could not settle the insurance controversy and finally determine the class members' rights to the policies unless they bound to that settlement, through litigation in which the members were parties, every claimant with any injury who might one day be able to assert a right against the insurers. Thus, the class had a state law interest, as third-party beneficiaries of the policies, in litigating the terms of any insurance settlement. Consistent with those rules, this Court held, in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), that litigation to bind a claimant with respect to insurance coverage issues, and thus affect claims under liability policies, present justiciable cases and controversies cognizable in the federal court.

The petition's studied ignorance of the insurance dispute that was the focus of the global settlement, and of the class members' legal interests in that dispute, manifests itself in a number of ways.

One, the petition characterizes class members as having solely individual claims for money damages, citing the court of appeals' statement (p. 24a) that the central remedial and legal theory of each named plaintiff is Fibreboard's tort liability for damages (p. 18). But this ignores what the court of appeals recognized, immediately thereafter:

> the issues that brought the named plaintiffs to

14. In *Shapiro*, the insurer through post-accident litigation obtained reformation against the insured of the policy in such a way as to exclude coverage. The reformation judgment, to which the claimant was not a party, could not bind him as to his interest in the policy. The court relied on authorities from New Jersey, Ohio, Idaho, South Carolina, and the Sixth Circuit.

> settle *Ahearn* are the same issues that the district court found common to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class.

(App. 24a-25a).

Two, the petition views the "central feature" of the global as the releases of Fibreboard and the insurers (p. 6). But the district court recognized the common interest of the class was to eliminate the risk posed by the insurance appeal and create a substantial, assured fund to provide compensation. (App. 191a).

Three, the petition asserts that substantive tort law provides no relief for late-arriving claimants (p. 23). But even if this were so, all claimants had a present legal interest in the policies under California law. Even those persons who might not have had a tort claim under the law of some state had a justiciable interest under California law in ensuring that funds would be available to compensate them when they contract an asbestos disease. (App. 51a).

This class possessed real and substantial interests in the insurance, and faced real and substantial risks of losing it all. The petition simply ignores these interests and risks, and characterizes the case as something it is not.

II. The Improper Characterization Of This Case Cuts Across Each Of Petitioners' Arguments And Renders Certiorari Unwarranted.

A. This Class Action Fits Squarely Under Rule 23(b)(1)(B) Because A Unitary Resolution Was Essential.

The petition accuses the Fifth Circuit of "bootstrapping a Rule 23(b)(3) class into a Rule 23(b)(1)(B) class" by "repeal[ing]" the individual claims and "replac[ing]" them with claims against the fund established by the settlement. (Pet. 22). This argument rests on a characterization of the case as an aggregation of individual money damage claims by persons who: (a) had no claim against a "specific property or common fund" (Pet. 19); and (b) lacked any "undivided common interest" when the case was filed. (Pet. 21).

But class members had an "undivided common interest" in the "specific property" of the insurance policies. These class members' interests were subject to complete defeasance if Fibreboard lost the insurance coverage appeal. The class simply converted interests in these contingent assets into a fixed, definite, and very large sum of money that could *not* be lost to an unsuccessful appeal. The class appropriated all of this money for itself.[15]

There was a risk of total loss absent unitary resolution, there was a way to eliminate that risk with a unitary resolution, and that is what the class accomplished. The resolution had to include all the class members. The insurers had either to settle the state insurance appeal or litigate it. This insurance coverage case, by its very nature, had to be resolved in a unitary fashion. Fibreboard, in turn, could not give over all its insurance to the class and leave itself exposed, defenseless, to a quick death at the hands of opt-

15. Here again, petitioners conceded in *Rudd* what they now attack. In their amicus brief in that case, petitioners likened the action to resolve the class members' rights to the insurance as being essentially one to "quiet legal title to a fixed asset." (Baron Amicus Br., FA 15a-16a).

outs, given the chance it might prevail on the appeal and thus use Continental insurance to cover pre-1959 claims and Pacific money to cover post-1959 claims. Any resolution required participation by every constituency with legal interests in the policies.

In short, this case fell squarely within Rule 23(b)(1)(B), something petitioners do not contest, and the dissenting judge below expressly conceded. (App. 86a-87a, n. 17, 96a, 98a). That Rule, in turn, is consistent with cases exemplified by *Smith v. Swormstedt*, 57 U.S. 288 (1854), which approved mandatory classes to resolve a matter of common interest.[16]

The petition notes the Fifth Circuit panel's statement that Fibreboard was a healthy company. (Pet. 19, citing App. 42a). The petition then persistently misdescribes this case as one of a mere theoretical risk of future insolvency (Pet. 9, 19), which they claim is like *Keene Corp. v. Fiorelli (In re Joint E. & S. Dists. Asbestos Litig.)*, 14 F.3d 726 (2d Cir. 1993). But Keene was plainly insolvent, with no potential source of funds to rescue it. Fibreboard was solvent. Fibreboard's problem, although it was healthy, was that it had the gun of a coverage case loss pointed at its head. Decision time was at hand. If that gun went off, there was nothing "theoretical" about it. Fibreboard was dead and class members would not even have the corpse to pick over. Put differently, this was not an insolvency situation with fixed, known assets to be parceled out, and a defendant seeking a substitute for an otherwise appropriate bankruptcy. This was all or nothing — either Fibreboard stayed healthy for an indeterminable time by winning the coverage appeal, or, after a coverage appeal loss, Fibreboard suddenly disappeared. And that is why this case fits within Rule 23(b)(1)(B).

B. The Action Satisfied The Rule 23(a) Criteria.

The effort to paint this case as one like *Amchem Products* finds expression once again in petitioners' contention that the lower courts relied wholly on the settlement to satisfy the Rule's requirements,

16. The Brief in Opposition filed by Continental Casualty Company contains a complete discussion of *Smith v. Swormstedt* and kindred cases.

e.g., by looking just to the class members' common interest in maximizing compensation from it. (Pet. 11).

Not so. The district court "approache[d] the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context." (App. 190a). Number one on the list of common issues here was avoidance of a loss on the coverage appeal. (App. 22a, 23a, 191a).[17] The class had just as much of a common interest in eliminating that risk, and seizing control of the fund thereby created, as did the *Rudd* class; in *Rudd*, petitioners urged that the requirements of Rule 23(a) were satisfied. (Baron Amicus Br., FA 14a-15a).

Contrary to their position in *Rudd*, petitioners claim that the class did not satisfy the typicality requirement of Rule 23. But here, as there, all claimants had an overwhelming interest in removing the coverage case risk, quite apart from the merits of their claims, that no one in the class would receive anything — and this interest was identical for both class members with manifest injuries and those who would manifest injuries in the future. (Baron Amicus Br., FA 11a-12a).

With no reference to the record, the petition (p. 12) argues that permitting a class for settlement that cannot be certified for trial eliminates the plaintiffs' leverage and affords enormous power to the defendant. With over 50% of the cases, Ness, Motley had plenty of leverage. These were the lawyers who could have destroyed Fibreboard in *Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990). Kazan and Wartnick were Fibreboard's principal adversaries on the West Coast. And now these counsel were armed with Continental's best efforts commitment in the April 9 Agreement, a matter Fibreboard pressed with a letter of July 9, 1993, which Continental viewed as setting it up for a bad faith claim in the event that global negotiations did not succeed.

17. Petitioners say the Fifth Circuit acknowledged that all of the common issues it identified "are derived from the settlement." (Pet. 11-12). That was the court's description of *petitioners'* argument. (App. 23a).

(FA 34a-35a; Tr. 1397-98, Fibreboard Trial Ex. 583). And these plaintiffs' lawyers had available the high Ness, Motley assignment settlement values and used them to ratchet up the global price. (App. 374a).

To claim that under the Fifth Circuit's decision, literally anyone can be a representative of any random group of people, so long as he negotiates a class settlement (Pet. 12) is to ignore the fundamental economic and legal interests that *this* class held in common in the insurance policies, and in converting those rights into a fund through which to satisfy their underlying claims, present and future, against Fibreboard.

Moreover, the settlement does not put numbers on individual cases. It simply sets up procedures never argued below to be unfair to establish values. Given that the overwhelming necessity for the class was to obtain the money, once obtained it makes no sense to permit punitive damages against a blameless claimant-controlled Trust.[18] Similarly, it does not make sense to permit early claimants an unrestricted opportunity to deplete the fund. While petitioners now cite dissenting Judge Smith's observation about the Trust spendthrift provisions (Pet. 14), they never suggested any other way to protect the rights of those who become sick in the future.[19]

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18. With possibly one exception, Fibreboard has never paid punitive damages. (App. 338a). The so-called cap on individual recovery of $500,000 is not significant either, since there have only been about a dozen individual Fibreboard settlements over that figure (App. 339a), out of over 104,000 asbestos claims resolved through 1992. (Fibreboard Trial Exh. 705, p. 41).

19. The petition argues that "substantive tort law provides no relief for late-arriving claimants" (p. 23). So, petitioners claim, Mr. Ortiz has an unfettered right to collect all the money he can, right now. Absent the global settlement, this presupposes that Fibreboard would prevail on the insurance coverage appeal, else there would be no money for Ortiz or anyone else. But in that event, "late-arriving claimants" covered by the policies would have been protected through those interests in the policies. Petitioners wish the courts to ignore the legal and economic protections that the futures claimants always had (unless, of course, Fibreboard lost its insurance coverage) and deliver up the entirety of the policy

(Cont'd)

Petitioners also cite the dissenting judge (Pet. 14) for the notion that Ness, Motley had conflicts between current clients and class members. But at the time of the Ness, Motley settlement, global discussions were in a preliminary, exploratory stage. (App. 31a). It was only after the Ness, Motley settlement that counsel reached agreement on a number of expected future claims to use as a benchmark in negotiations, Pacific was persuaded to join, plaintiffs' counsel refused to include present claims in the global settlement, and the insurers offered $1.3 billion, and then $1.5 billion. (App. 290a-293a).

Finally, petitioners contend that notice to future claimants never can be adequate. They did not and do not object to the specific contents of or procedures used to disseminate notice (App. 423a-424a), nor do they suggest any better notice was possible. They do not contend that the best notice reasonably practicable under all the circumstances was not given, within the principle of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). They simply insist that it cannot be done. Yet, the notice advises of the critical features: the risks associated with the coverage appeal; the amount of the fund that would become available in a settlement; and procedures for distributions from the fund. No rule of law requires more.

C. There Is No Article III Issue Warranting Certiorari.

The petition does not present any "fundamental questions" concerning Article III jurisdiction.

1. This Was Not A Feigned Or Friendly Suit; The Timing Of The Settlement Did Not Preclude Jurisdiction.

Petitioners argue that because the tentative settlement of this

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(Cont'd)
proceeds, now liquidated pursuant to the backup settlement, for Ortiz and his lawyer to appropriate as fast as they can.

class action occurred before the complaint was filed, the class action was a "contrivance" over which the district court had no jurisdiction.

The district court determined that "there has been nothing feigned or collusive about the negotiations that brought the parties to court." (App. 214a). The intense conflict among the plaintiffs, Fibreboard, and the insurers remained "live" pending approval of the settlement. (App. 301a). As the district court found, "[t]he disputes among the parties are real and, unless the settlement is approved, those disputes will continue." (App. 214a). The inapposite "feigned suit" cases cited by petitioners do not undermine the district court's fact-bound conclusion that this action presented a non-collusive, justiciable case or controversy.[20]

Petitioners' feigned suit argument is also defeated by the well-settled principle that a lawsuit purportedly conceived without sufficient party adversity to create a case or controversy can be saved by the participation of an adverse intervening party, like petitioners and the other objecting intervenors. *See INS v. Chadha*, 462 U.S. 919, 930-31, nn. 5-6 (1983).[21]

The claim that a pre-filing settlement destroys a "case or controversy" has been refuted as well by consent decree cases.

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20. *United States v. Johnson*, 319 U.S. 302 (1943), and *Moore v. Charolette-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971), are not on point because in those cases there was no evidence that the parties had antagonistic legal or economic interests. This case is also nothing like *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339 (1892); *Muskrat v. United States*, 219 U.S. 346 (1911); or *Poe v. Ullman*, 367 U.S. 497 (1961), where the parties sought advisory opinions regarding the validity of statutes. Furthermore, *Dawson v. Columbia Ave. Saving Fund, S.D., T. & T. Co.*, 197 U.S. 178 (1905), is inapt because that case involved the loss of diversity jurisdiction.

21. *Accord Florida Int'l Indemnity Co. v. Metter*, 952 F.2d 1297, 1298 n. 3 (11th Cir. 1992); *Springfield v. Washington Pub. Power Supply System*, 752 F.2d 1423, 1426-27 (9th Cir. 1985); *Associated General Contractors, Inc., etc. v. Laborers Int'l Union*, 476 F.2d 1388, 1402-03 (Temp. Emer. Ct. App. 1973); *Air Line Pilot Ass'n Int'l v. Trans World Airlines, Inc.*, 506 F. Supp. 234, 235 (S.D.N.Y. 1980).

See, e.g., Swift & Co. v. United States, 276 U.S. 311, 325-26 (1928); *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1994). The consent decree jurisprudence cannot be distinguished by arguing that the cases involved claims which the government supposedly intended to litigate if a settlement had not been reached. The same situation existed here because, absent settlement, these plaintiffs and their lawyers would sue Fibreboard (indeed perhaps in a class action) and claim money from the insurers — unless, of course, Fibreboard lost the coverage case, in which event no class member would have a Fibreboard to sue or insurance coverage to collect.

2. All Ahearn Class Members Had Standing.

Petitioners do not raise lack of standing as part of their expansive question presented, pitching instead their Article III "case or controversy" issue on the feigned suit argument. The petition only alludes by footnote to the dissent's view that the "exposure-only" class did not have a present, legally protected interest. *See* Pet. 17, nn. 7 and 8. Article III standing only rests in persons with injury in fact. Petitioners assert that this requires a "legally protected interest," and, petitioners say, there are states that do not provide a cause of action to persons exposed to asbestos. (Pet. 17, nn. 7 and 8).

This Court recently described the necessary injury in fact as a "judicially cognizable interest" which is concrete and particularized, and actual or imminent. *Bennett v. Spear*, No. 95-813, decided March 19, 1997. An individual's exposure to asbestos is plainly concrete, particularized, and actual, and so is his interest in an insurance policy necessary to compensate him. Standing here exists two ways.

First, federal court standing depends on the actual issue to be decided by the federal court even in a diversity case, where state law furnishes the basis for the complaint, and that issue need not be the claims pleaded in the complaint. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500

U.S. 72 (1991).[22] Under *Primate*, standing must be evaluated in the light of the judicially cognizable interests that were invoked before the district court during the trial of the case. Those issues included the legal rights held by this class — and each member of it — under California law in the insurance policies.

Hence, the theory of standing unanimously approved as to the backup settlement by the Fifth Circuit in *Rudd*, and endorsed by petitioners there, applies here. The *Rudd* class was in a position to defend the insurers' suit on the ground that the settlement fund was insufficient, because it did not provide additional money for defense — precisely why Fibreboard balked at accepting the backup settlement amount. As members of the defendant class in *Rudd*, the global class could have insisted, as a condition to any settlement, that *it* get the money and institute an equitable method to distribute the funds among the class, the trade-off being that Fibreboard would obtain a release. That is what *Ahearn* does.[23]

Second, the district court found that the complaint alleged valid claims for personal injury that *would now* lie under California tort law, a state where Fibreboard had its headquarters and could be

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22. This was a Louisiana diversity case removed to federal court. The court of appeals found no federal standing over the Louisiana law claims alleged in the complaint. This Court found the existence of Article III standing over the state law cause of action to be irrelevant because the actual subject of federal adjudication was the propriety of federal removal, and standing to dispute removal was plainly present:

> The "adverseness" necessary to resolving the removal question is supplied not by petitions' claims but rather by petitioners' desire to prosecute their claims in state court.

(*Id.* at 78).

23. Contrary to the petition's assertion (p. 17, n. 7), the global settlement *did* redress the claims of exposure-only class representatives, because it made money available to them. Indeed, that seems to be petitioners' quarrel, for they perceive themselves to be inhibited from raiding the fund now to the detriment of the futures, who, to petitioners' apparent consternation, are protected.

sued. (App. 217a-218a). Those claims satisfy the "judicially cognizable interest" test. A California choice-of-law analysis would support the application of California tort law, even to plaintiffs residing in other states.[24] A judicially cognizable interest test, under settled law, would require only a good faith basis for asserting those legal rights and would *not* depend on whether a litigant will succeed on the merits.[25]

Finally under Article III, petitioners assert that any authority of the class representatives to litigate insurance coverage claims did not extend so far as to allow those representatives to compromise personal injury claims. (Pet. 17). This argument overlooks third party beneficiary interests of class members under state law in the Fibreboard insurance policies, and the interrelated nature of the insurance and asbestos exposure claims.[26]

D. Resolution Of This Action Did Not Violate The Rules Enabling Act Or Other Statutes Or Rules.

Arguments that the court below sanctioned violations of the Rules Enabling Act (28 U.S.C. § 2072) and the Rules of Decision Act (28 U.S.C. § 1652), and so forth, proceed, as does this entire petition, on the express, but incorrect, assumption that the only claims and interests involved are individual, personal causes of action for damages. (Pet. 20-25.)[27] To repeat: each class member

24. Fibreboard was located in and amenable to suit in California, which normally allows an injured plaintiff from another state to recover under California law if California law extends more compensation than does the plaintiff's home state. *See, e.g., Marsh v. Burrell*, 805 F. Supp. 1493, 1498 (N.D. Cal. 1992).

25. *E.g., Davis v. Passman*, 442 U.S. 228 (1979); *Bell v. Hood*, 327 U.S. 678 (1946).

26. Petitioners' argument also overlooks *Matsushita Electrical Industrial Co., Ltd. v. Epstein*, __ U.S. __, 116 S. Ct. 873 (1996); this Court there recognized that a court with jurisdiction over a class action could approve in binding fashion a settlement that released claims that were not within the jurisdiction of the court.

27. The petition (pp. 18-22) refers to a supposed statement by the district court that "[the] claims were, prior to the settlement, in personam in character," (Cont'd)

had rights in the insurance policies which would determine whether a class member would realize anything at all on his or her personal claim. Petitioners simply refuse to acknowledge these rights. Far from ignoring substantive rights, the courts below fulfilled them.

Consider petitioners' observation that if Ortiz obtained a final judgment against Fibreboard he could execute on Fibreboard's assets and collect the entirety of it and no other class member could interfere. (Pet. 23). That would be correct, *if* there were (a) a Fibreboard left to sue, or (b) assets upon which to execute. The point of this entire proceeding was to eliminate the real and significant risk that there would be neither, and that *all* the class members' interests in the *only* source of recovery, the insurance, would disappear, very soon. The courts below did not work some quasi-legislative reform, making judgments about what might accomplish the greatest good for the greatest number of class members. They solved a serious problem that threatened to result in zero good for any class member.

CONCLUSION

In petitioners' view, any plaintiffs' asbestos class counsel faced with the dangers, and the opportunity, presented in August of 1993 should have reasoned as follows: Even though (1) no class member will recover a dime if Fibreboard loses its coverage case (about to be decided on appeal); (2) there is a significant risk that Fibreboard will lose, and all the class members' interests in those policies will go down the drain; (3) Fibreboard and its insurers have shown — each for quite understandable reasons — that they cannot settle separately; (4) Continental is under great pressure to achieve a global settlement in order to fulfill its commitments in the April 9 Agreement and to avoid the cataclysmic consequences of a Fibreboard victory on appeal; (5) the insurers have offered a sum — over $1.5 billion for the class — that is incontestably fair; and

(Cont'd)
citing to Judge Smith's dissent (App. 122a, n. 56), which in turn is bereft of citation. It is not clear where this statement came from, or if authentic, in what context it was made.

(6) the case falls within the traditional contours of Rule 23(b)(1)(B); *nonetheless*, the class cannot go forward; it must stand idly by, and risk total disaster. That is because counsel for petitioners advise that there is no case or controversy (despite the enormous transfer of wealth to take place); there cannot be a mandatory class (although the case falls within the Rule); there is insufficient common interest in averting the disaster of a total loss of any recovery for any class member; any counsel experienced in asbestos claims is disqualified by conflict from representing the class; and, no matter what is done, adequate notice is impossible. Any lawyer with the best interests of the class at heart would reject petitioners' reasoning and conclude that in *this* unique set of circumstances, the class should seize the opportunity, eliminate the risks and take the money — that indeed, it would be irresponsible to do otherwise.

This case is much different from *Amchem Products*, or *Adams*, or most any other class action proceeding likely to be brought. If there is a road map here, it is to a road very few could follow. For as one of counsel for petitioners, Mr. Baron, has acknowledged,

> Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again.

(Business Insurance, August 5, 1996, at 38).

Mr. Baron is right. This Court should deny the petition.

Respectfully submitted,

KELLY C. WOOSTER
Counsel of Record
STEPHEN M. SNYDER
WILLIAM R. IRWIN
THOMAS M. PETERSON
LAURA J. REMINGTON
MICHAEL B. GREEN
BROBECK, PHLEGER
& HARRISON LLP
Attorneys for Respondent
Fibreboard Corporation

APPENDIX A — BARON AND BUDD FIFTH CIRCUIT BRIEF IN *CONTINENTAL CASUALTY CO. V. RUDD*

95-40694

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN RE ASBESTOS LITIGATION

CONTINENTAL CASUALTY CO., et al.,

v.

RUDD, et al.,

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

***AMICI CURIAE* BRIEF OF ESTEBAN Y. ORTIZ, ET AL. IN SUPPORT OF APPELLEES**

FREDERICK M. HARON
Texas Bar No. 01797000
BRENT M. ROSENTHAL
Texas Bar No. 17281075
STEVE BAUGHMAN
Texas Bar No. 00783615

BARON & BUDD
A PROFESSIONAL CORPORATION
The Centrum, Suite 1100
3102 Oak Lawn Avenue
Dallas, Texas 75219
(214) 521-3605
(214) 520-1181 (Telecopier)

SIDNEY POWELL
Texas Bar No. 16209700
S. ANN SAUCER
Louisiana Bar No. 21368

POWELL & ASSOCIATES
1920 Abrams Parkway, #369
Dallas, Texas 75214
(214) 653-3933
(214) 319-2502 (Telecopier)

ATTORNEYS FOR ESTEBAN Y. ORTIZ, EDEE COCHRAN, LESTER E. TAYLOR, JOHN ALLGOOD, AND HENRY EVERS

Appendix A

CERTIFICATE OF INTEREST OF AMICI CURIAE

No. 95-40694
Continental Casualty Co., et al. v. Rudd, et al.

Pursuant to Fifth Circuit Local Rule 28.2.1, as modified by Local Rule 29.2, the Ortiz Appellants hereby certify that the following listed persons constitute the *Amici Curiae* interest:

Amici Curiae:

Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers

Trial and Appellate Counsel for *Amici Curiae*:

Frederick M. Baron
Brent M. Rosenthal
Steve Baughman
Baron & Budd

Appellant Counsel for *Amici Curiae*:

Sidney Powell
S. Ann Saucer
Powel & Associates

Respectfully submitted,

s/ Sidney Powel
SIDNEY POWELL
Texas Bar No. 16209700
S. ANN SAUCER
Louisiana Bar No. 21368
POWELL & ASSOCIATES
1920 Abrams Parkway, #369
Dallas, Texas 75214
(214) 653-3933
(214) 319-2502 (Telecopier)

Appendix A

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Appendix A

STATEMENT OF THE INTEREST OF *AMICI CURIAE*

Amici curiae Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood, and Henry Evers are all members of the defendant health claimant class in *Continental Casualty Co. v. Rudd*, in addition to being members of the plaintiff class in *Ahearn v. Fibreboard Corp.* These class members did not participate in the district court proceedings in the *Rudd* case, but they intervened in *Ahearn* for purposes of objecting to the proposed plaintiff class settlement releasing class members' present and future personal injury claims against Fibreboard. *Amici* appealed from the district court's judgment in *Ahearn*, and their initial brief in that case ("Brief of the Ortiz Appellants") is now on file with this Court.

Despite their strenuous objections to Ahearn, *amici* fully support the *Rudd* judgment, which neither extinguishes nor impairs asbestos victims' claims against Fibreboard, but instead merely resolves a declaratory judgment action by Fibreboard's insurers against two defendant classes of individuals with a colorable basis for objecting to the reasonableness of the policies' settlement. The agreement between Fibreboard and its insurers is highly beneficial for asbestos victims because it eliminates the risk that billions in insurance proceeds will be lost in the event that Fibreboard does not prevail in the Coverage Case.

STATEMENT OF THE CASE RELEVANT TO *AMICI CURIAE* ARGUMENT

This case, *Continental Casualty Co. v. Rudd*, relates to an October 12, 1993, settlement agreement (the "Trilateral Agreement") among Fibreboard Corporation and certain of its insurers, Continental Casualty Company, CNA Casualty Company, and Pacific Indemnity Company (the "insurers"). The Trilateral Agreement confirms the insurers' coverage of tort liability arising from Fibreboard's manufacture of asbestos and provides for an approximately 3.5 billion dollar liquidation of

the policies.[1] The agreement eliminates the risk that the insurers will be absolved of liability in a California state case, *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case"), now stayed pending resolution of this case. By its terms, the Trilateral Agreement requires court approval, in a "Settlement Agreement Approval Judgment," of the settlement of the Coverage Case. This judgment was obtained in *Rudd*.

In contrast to the class settlement at issue in *Ahearn*, the *Rudd* judgment has no effect on asbestos victims' tort remedies, "except to the extent that potential rights of direct action against the Insurers will be abrogated by [the Settlement Agreement Approval Judgment]." (*Rudd* FOF:70¶113).[2] *Rudd* is an adjudication of "whether the Insurers and Fibreboard may settle — without the consent of any other individual or entity — legitimate insurance coverage disputes by paying fair value, in a way that terminates all rights that might be asserted by strangers to the disputed policies[.]" (*Rudd* FOF:63¶103). "The principal legal question presented by the case is whether, and under what circumstances, an insurer and an insured (here, the Insurers and Fibreboard) may settle their insurance policy." (*Rudd* COL:21¶43(a)). The two classes subject to the *Rudd* declaratory action are individuals with a colorable stake in Fibreboard's insurance coverage.

Although the Trilateral Agreement contemplates that judgments could be entered in both *Ahearn* and *Rudd*, the agreement also anticipates that only the *Rudd* judgment may be

1. Under the agreement, 2 billion will be paid to Fibreboard to defend and indemnify post-August 27, 1993 claims. Additionally, all previously pending cases will be defended and paid by the insurers (JA76:9-15).

2. Citations to "*Rudd* FOF" reference the district court's Findings of Facts entered in *Rudd*. See Flanagan RE13. Citations to "*Rudd* COL" reference the district court's Conclusions of Law entered in *Rudd*. *See* Flanagan RE5.

legally feasible (JA76:4, 10-15; *Rudd* FOF:47¶80,53¶91). *Rudd* therefore effects a stand-alone, back up agreement regarding Fibreboard's insurance coverage independent of the plaintiff class settlement of personal injury claims instituted in *Ahearn* (*Rudd* FOF:47-8,¶¶81-2). Fibreboard and the insurers intend that the Settlement Agreement Approval Judgment in *Rudd* be effective notwithstanding the lack of viability of the Global Settlement Agreement entered in *Ahearn*:

> Whether or not the Global Settlement Agreement is executed or obtains the final necessary court approvals to become effective, upon entry of Settlement Agreement Approval Judgment the parties desire and intend by this [Trilateral] Settlement Agreement to fully and finally compromise all claims under the Insurance Policies not previously released, including any and all claims asserted in the Coverage Case.

(JA76:4¶O). The agreement details the procedure to be followed if the Settlement Agreement Approval Judgment succeeds but the Global Settlement fails: approximately two billion dollars will be paid to Fibreboard for its use in paying unliquidated tort claimants, who will still retain the right to bring tort actions against Fibreboard (JA76:10-15 §2.3, 18 §3.3). This outcome provides the appropriate resolution of this entire appeal.

This *Amici Curiae Brief* urges affirmance of *Rudd* despite the fact that the Ortiz Appellants' Brief in *Ahearn* argues for reversal of that case. The only asbestos claimants opposing *Rudd* are the Flanagan Appellants, who "did not present any credible evidence that the Trilateral Settlement Agreement is an inadequate or insufficient settlement, and did not offer a cogent reason why the [district court] should decline to enter such judgment." (*Rudd* FOF:70-71¶114; *see also Rudd* FOF:56).

Appendix A

SUMMARY OF THE ARGUMENT

Rudd does not present the same case and controversy issue that undermines the judgment in *Ahearn*, as the *Rudd* classes were not represented by class counsel in *Ahearn*, the *Rudd* dispute between the insurers and the class of potential asbestos victims was not settled *ab initio*, and the relief prayed for in the *Rudd* complaint was not feigned. Because *Rudd* is predominantly equitable and is certifiable under subsections (b)(1) or (b)(2) of Rule 23, *Rudd* also is distinguishable from *Ahearn*, which, if certifiable for class treatment at all, is properly certifiable only as a Rule 23(b)(3) class. Here, unlike in *Ahearn*, Rule 23(a)'s commonality and typicality requirements are met because the claims to be adjudicated in *Rudd*, the defendant class members' colorable challenges to the reasonableness of the insurers' settlement with Fibreboard, raise issues that are identical for each class member. Whereas the district court in *Ahearn* relied completely on the terms of settlement to create the requisite commonality and typicality, here the reasonableness and propriety of the Trilateral Agreement is the central issue to be litigated in the Insurers' declaratory judgment action.

ARGUMENT

I. THE TWO BILLION DOLLAR LIQUIDATION OF FIBREBOARD'S POLICIES WITH THE INSURERS BENEFITS ASBESTOS VICTIMS.

If *Ahearn* is reversed and *Rudd* is affirmed, then $1.525 billion plus interest from the insurers, and an additional $475 million, less certain deductions, will be made available to Fibreboard to pay costs and claims arising from asbestos injuries (*Rudd* FOF:53-54¶91; JA76:10-15§2.3, 18 §3.3). However, for these substantial funds to be available to Fibreboard, and thus indirectly to future asbestos victims, the judgment in *Rudd* must be affirmed here (*Rudd* FOF:55¶93 (explaining Trilateral)). Fibreboard's counsel testified that the settlement quantum likely

will cover the entire cost of Fibreboard's future asbestos claims, and Fibreboard has publicly attested to the fairness of the *Rudd* settlement (*Rudd* FOF:66¶107; JA7:436-37, 621-22, 2667-74). The district court correctly determined that no third parties' rights were abrogated by the Settlement Agreement Approval Judgment. While certain states' laws impose a duty upon insurers and insureds to negotiate fairly with each other, no state or territory grants claimants a "veto" power to prevent an insured from liquidating the policy in a reasonable, arm's-length settlement (*Rudd* COL:22-23¶43).

Fibreboard and the insurers fought for nearly two decades before resolving their coverage dispute (*Rudd* FOF:55¶93). The insurers were unwilling to pay more than the amounts ultimately achieved under the Trilateral Agreement (*Rudd* FOF:65¶106; JA7:1445, 1461-62, 1470-79, 1542). If the Trilateral Agreement is not ultimately approved, future asbestos victims face a risk that Fibreboard may lose the Coverage Case, rendering tort judgments against the company uncollectible (*Rudd* FOF:55¶93). The district court found that "the consequence of non-recovery presented to the classes if the significant risk posed by the Coverage Case materializes is so dire as to be unacceptable if a reasonable alternative is available." (*Rudd* FOF:64¶105). Even the California Supreme Court's favorable adjudication of the Coverage Case does not assure immediate termination of the litigation, as issues unique to the parties are still pending in the Court of Appeal (*Rudd* FOF:61¶100). Thus, even under the best of scenarios, the claimants face years of uncertainty absent settlement. *Id.*

With the exception of counsel for the Flanagan Appellants, the overwhelming consensus of all informed counsel is that the insurance settlement is in the best interest of asbestos victims (see *Rudd* FOF:56¶93). The representatives of the defendant class of asbestos-exposed individuals were gravely concerned that the California Supreme Court will eviscerate Fibreboard's insurance coverage by adversely deciding the Coverage Case. *Id.* Professor

Eric D. Green, the Guardian Ad Litem in *Ahearn*, opines that the risks of "roll[ing] the dice" in the Coverage Case are too significant for future asbestos victims to take this chance (*Rudd* FOF:56-57¶93). Counsel for the *Ahearn* class of future asbestos victims similarly believe that the benefits of the policies' settlement outweigh the risk of future litigation in the Coverage Case (*Rudd* FOF:56¶93).

After massive international notice, only one member of the asbestos claimants' bar and a minuscule number of asbestos-exposed individuals objected to the *Rudd* settlement. The *Rudd* detractors presented "no substantial evidence of economic inadequacy or practical detriment" caused by court approval (*Rudd* FOF:67-68¶¶108-09). Even a client of Mr. Jaques, counsel for the lone Flanagan objectors to *Rudd*, supports the settlement (*Rudd* FOF:68¶110; JA7:3021-25). Although defining themselves as a maritime class, the Flanagan Appellants also stand in opposition to the American Merchants Marine Veterans, a national organization that supports the *Rudd* settlement. *Id.*

In addition to its independent assessment that the Trilateral Agreement was fair, reasonable, and arm's-length, thus justifying the requested declaratory relief, the district court held that the class representatives' consent was valid. The court-appointed counsel for the *Rudd* defendant class of asbestos victims consented to the entry of the Settlement Agreement Approval Judgment at trial. Consent was "fully independent[,]" and made "only after careful consideration of the circumstances, based upon [the representatives'] independent determination that this furthered the best interests of the respective classes." (*Rudd* FOF:60-61¶99). The "unusually complete information" illuminating the benefits of the settlement include full discovery and trial in the district court; exhaustive discovery, trial, and appellate briefing in the Coverage Case; and decades of underlying asbestos personal injury litigation (*Rudd* FOF:61-62¶101; JA7:650-53, 1129-36).

By affirming *Rudd* and reversing *Ahearn*, this Court can maintain the institutional integrity of the federal courts which is threatened by the proposed quasi-legislative tort reform program that is the subject of *Ahearn*, and simultaneously ensure that future victims will have access to proceeds from Fibreboard's contested insurance coverage. *Ahearn* and *Rudd* "create very different procedures for handling" the insurance proceeds (*Rudd* FOF:52¶89). *Rudd* does not affect tort claimants' ability to sue Fibreboard in the future as their claims become ripe. Without the waivers and restrictions of the Global Settlement Agreement in *Ahearn*, the injured claimants will be able to sue Fibreboard and to include their lawful claims for punitive damages, joint and several liability, and pre- and post-judgment interest.

II. A CASE AND CONTROVERSY EXISTS IN *RUDD*.

A. *Rudd* Class Counsel Litigated Their Clients' Claims.

The procedural history of *Rudd* significantly differs from *Ahearn* on the issue of whether a live controversy supports justiciability. The two defendant classes certified in *Rudd* are a Health Claimant Class of parties exposed to asbestos who had yet to bring a claim against Fibreboard, and a Third-Party Claimant Class of those with potential liability related to these exposed parties' claims, as, for example, other manufacturers of asbestos-containing products that could be co-defendants with Fibreboard (*see Rudd* FOF:3). Although the definitions of the *Ahearn* plaintiff class and *Rudd* defendant health claimant class coincide, the *Ahearn* plaintiff class counsel, which was hand-picked by Fibreboard, did not represent the defendant class of asbestos-exposed individuals in *Rudd*. The *Rudd* Health Claimant Class counsel was appointed independently by the district court after the case was filed (*Rudd* FOF:8¶8). Rather than agreeing to the case prior to its commencement, as occurred in *Ahearn*, counsel for the Health Claimant Class and Third-Party Claimant Class in *Rudd* answered the complaint, denying the insurers' right to a declaratory judgment and raising numerous affirmative

defenses to the action (*Rudd* FOF:9-10¶¶11-12). *Rudd* defendants' class counsel participated in discovery as adversaries to the insurers (see *Rudd* COL:10¶21; *Rudd* FOF:11¶13). It was not until after trial that class counsel consented to the terms of the Trilateral Agreement (*Rudd* FOF:13¶17, 14¶19), and they did so only after negotiating an amendment to the terms of the Trilateral Agreement to provide for a "Special Reserve Agreement" setting aside $50 million to enhance the prospect that claimants in later years will have access to funds (*Rudd* FOF:71¶115).

B. Whether the Settlement Is Reasonable Is an Issue Ripe for Adjudication.

The *Ahearn* settlement releases tort claims against Fibreboard for injuries that do not exist but might occur in the future. In contrast, *Rudd* resolves the propriety of an *existing* settlement among Fibreboard and its insurers. The *Rudd* claims are ripe for judicial review because the facts that give rise to the defendants' right to oppose the settlement have already transpired. " 'A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.' " *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) (quoting *New Orleans Public Service, Inc. v. Council of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987)). No further facts bear on whether the settlement among the insurers and Fibreboard was reasonable at the time it was reached or whether the manner of the policies' liquidation was fair.

Even if this Court considers unripe the claims of the Insurers with respect to defendant class members who currently have no asbestos-related disease, the class relief sought here is appropriate because many defendant class members, including *amici* Esteban Ortiz, John Allgood, and Henry Evers, already have asbestos-related injuries. With respect to such defendant health claimant class members who *do* have current asbestos-

related injuries, their interest in the liquidation of Fibreboard's insurance policies is unquestionably ripe for adjudication today. And, as noted by the Rules Advisory Committee with respect to Rule 23(b)(2), "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Rules Advisory Committee Note to Subdivision 23(b)(2). Because the Insurers' claim regarding the propriety of the Trilateral Settlement is, at the very least, ripe with respect to defendant class members who now suffer from a current asbestos-related disease, their request for declaratory relief with respect to the entire class is permissible. Here, "the adjudication of the issue as to one class member must be an adjudication as to all[,]" (*Rudd* COL:16¶35), and the relief with respect to currently ill defendant class members therefore has general application to class members who have not yet developed any asbestos-related condition.

III. THE *RUDD* CLASSES RECEIVED DUE PROCESS.

The constitutional limitations on employment of the class action device articulated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), are not violated in *Rudd*.[3] In *Shutts*, the Court took great care to note that the due process requirement of a right to opt-out does not apply to equitable claims: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." 472 U.S. at 812 n.3. Here, the insurers' request for declaratory and injunctive relief falls outside the bounds of *Shutts*, in sharp contrast to the money damages claims at issue in *Ahearn*. The monetary consideration in *Rudd* does not change hands between the plaintiff insurers and the defendant classes;

3. The Ortiz Appellants contend that *Shutts* is violated in *Ahearn* (*compare* Ortiz Appellants' br., 26-34).

rather, the effect of the Settlement Agreement Approval Judgment is merely court approval of the policies' liquidation. Furthermore, *Rudd* does not implicate the same fundamental fairness concerns regarding individual control that necessitate an opt-out right in *Ahearn*.

Unlike class members in *Ahearn*, the members of the health claimant class in *Rudd* currently possess sufficient information to determine whether to challenge the settlement, and they are each identically situated for purposes of assessing that information. The facts shaping the substantive claim in *Rudd* — whether the settlement was fair — have already been fully developed. This sharply contrasts with the *Ahearn* class claims released in that settlement, which are based on injuries and factual circumstances that have not yet occurred and will be individual to each claimant.

The district court's approval of the policies' liquidation in *Rudd* is more akin to the trust, common fund, and suit to quiet title cases relied upon by the district court in *Ahearn* and distinguished by the Ortiz Appellants (*see Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987); *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Meyer v. Citizens and Southern Nat'l Bank*, 677 F. Supp. 1196 (M.D. Ga. 1988) (discussed in Ortiz Appellants' br., 50)). The tort claims extinguished in *Ahearn* are individual, depend on unique and future facts, and do not require present extinction on a global basis. By contrast, *Rudd* invokes the classes' collective, fungible interest in a single settlement agreement of the insurance coverage dispute and will make approximately $2 billion dollars available to Fibreboard for asbestos victims who may pursue their individual tort claims and due process rights.

The *Klugh* court, in permitting present resolution of futuristic claims, relied on a "remaindermen" theory, which requires that "one of the parties to the action is so closely aligned with the interests of the nonparty as to be his virtual

representative." 818 F.2d at 300. Any *Rudd* claimant qualifies as a virtual representative of the other with regard to challenging the arm's-length quality and fairness of the settlement. Regardless of how one was harmed by asbestos, whether Fibreboard and the insurers settled the policy for a reasonable quantum and in an arm's-length transaction are identical issues shared by all. Because one's individual injury from asbestos is unique, the *Ahearn* extinction of individual personal injury claims in global form is both unnecessary and impermissible. Whether a single tort claimant chooses to settle a claim with Fibreboard has no inherent interrelation to another victim's decision to settle. In *Rudd*, by contrast, the court's adjudication of the propriety of the settlement necessarily determines the rights of all people with any claims to the policies, as did the adjudications regarding common property in *Klugh*, *Hatch*, and *Meyer*.[4]

IV. RULE 23 IS NOT VIOLATED.

A class action must satisfy the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23. Because the issues of fairness and arm's-length character of the settlement negotiations and the reasonableness of the settlement amount are common to all class member claims, Rule 23(a) is satisfied. The Rule 23(b) requisite is met because *Rudd* is certifiable under either Rule 23(b)(1)(A) or 23(b)(2).[5]

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4. Similar to *Klugh*, the holding in *Hatch* was derived from the "contingent remaindermen" theory. 361 F.2d at 566. *Hatch* and *Meyer* both assume that a guardian ad litem could be appointed to represent the interest of unborn children in a trust or real property without violating federal constitutional due process. *Id.*; *Meyer*, 677 F. Supp. at 1209.

5. The district court determined that Rule 23(b) was met in any one of three ways: under subdivision 23(b)(1)(A), 23(b)(1)(B), or 23(b)(2) (*Rudd* COL:13¶30). This Court need not address whether the Rule 23(b)(1)(B) "limited fund" provision applies, as two alternate theories for certification justify affirmance (*see Rudd* COL:17¶36 ("[I]t is not necessary for the Court to analyze the case in terms of the existence of a 'limited fund.' ")).

Appendix A

Unlike the *Ahearn* case, in which numerous individual issues regarding exposure, medical causation, and damages pervade and predominate each plaintiff class member's claim against Fibreboard, the Insurers' claims for declaratory relief in *Rudd* all reduce to issues regarding the fairness of the Trilateral Agreement and the non-collusiveness of its negotiation. Because those issues are identical with respect to all defendant class members, they satisfy Rule 23(a)'s requirements of commonality and typicality. As tort claims against Fibreboard are not directly at issue in this case, individual issues endemic to asbestos litigation pose no obstacles to certifying a class.

The requirements of Rule 23(b)(2) and (b)(1)(A) are met in *Rudd* because the district court proceeding was effectively an action by the Insurers to quiet legal title to a fixed asset — Fibreboard's insurance policies. Subdivisions (b)(2) and (b)(1)(A) were both designed to apply in situations in which the relief sought would necessarily determine the rights of all class members, regardless of their individual circumstances. *See* Rules Advisory Committee Note to Subdivision 23(b)(2) ("[t]his subdivision is intended to reach situations where . . . final relief of an injunctive nature or of a corresponding declaratory nature, settle[s] the legality of the behavior with respect to the class as a whole"); Rules Advisory Committee Note to Subdivision 23(b)(1)(A) (explaining that certification under subdivision (b)(1)(A) is appropriate to avoid incompatible adjudications with respect to rights and duties regarding particular property).

As potential third-party beneficiaries to that asset, all of the defendant health claimant class members have an interest in pursuing a legal claim to the settlement proceeds. The Insurers filed this action seeking a declaration that no such legal claim would be valid if made directly against the insurance policies, and that Fibreboard, as the insured, is the proper holder of title to the proceeds from the liquidated policies. The Insurers' right to such a declaration turns solely on the facts surrounding the

settlement they reached with Fibreboard, rather than on any individual circumstances of defendant class members. Thus, any adjudication of the Insurers' right to quiet title with respect to a single defendant class member necessarily determines the rights of all other class members, (*Rudd* COL:16¶35 ("the adjudication of the issue as to one class member must be an adjudication as to all")), and the district court's certification under Rule 23(b)(1)(A) or 23(b)(2) was therefore proper.

CONCLUSION

The *Rudd* judgment is in the best interest of Fibreboard's asbestos victims. Unlike the private adjudication system created by *Ahearn* to substitute for the state and federal courts, the *Rudd* judgment leaves individual class member claims against Fibreboard untouched and merely allows certain of Fibreboard's insurers to liquidate the policies by making substantial funds available to Fibreboard. The constitutional and procedural problems requiring reversal in *Ahearn* are not an obstacle to *Rudd*. The judgment in *Rudd* should be affirmed.

Respectfully submitted,

FREDERICK M. BARON
Texas Bar No. 01797000
BRENT M. ROSENTHAL
Texas Bar No. 17281075
STEVE BAUGHMAN
Texas Bar No. 00783615
BARON & BUDD
A PROFESSIONAL
CORPORATION
The Centrum, Suite 1100
3102 Oak Lawn Avenue
(214) 521-3605
(214) 520-1191 (Telecopier)

SIDNEY POWELL
Texas Bar No. 16209700

S. ANN SAUCER
Louisiana bar No. 21368
POWELL& ASSOCIATES
1920 Abrams Parkway, #369
Dallas Texas 75219
(214) 653-3933
(214) 319-2502 (Telecopier)

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

FREDERICK M. BARON STATEMENT

[Commencing at page 89]

* * *

Your Honor, let me also begin by clearing some brush. We think that the settlement that was reached between Continental Insurance, Pacific and Fibreboard is a superior settlement; we think it is something that ought to be approved very promptly by this court; and we think that that settlement will resolve all of the issues that otherwise would be before this court. That settlement known as the trilateral is a great settlement, as far as I'm concerned, I know of no one that opposes it. . . .

* * *

STEPHEN M. SNYDER TESTIMONY

[Commencing at page 171]

* * *

Q. All right. What did you do to come up with a new, better or improved SSP?

A. Couple of things. We had information from the people that we had talked to, it was pretty clear that they had a couple of problems. First of all, they wanted some cash before they would accept any kind of arrangement. And they weren't totally against the idea, but they were concerned that Fibreboard could not be trusted to conserve its [172] resources and that if they didn't pull its resources out of it right now it might run away and hide those resources at a later time. So they were concerned about that. And in many of our talks with people, we were told that the people that they referred to or consulted with on what to do

about their Fibreboard cases were the lawyers in California, principally the northern California lawyers Steve Kazan and Howard Wartnick. We went back with the thought if we could make the structured settlement program work with those two lawyers that the word would get out that this was a program that could be trusted and accepted.

So we met with them late in 1988. I think they investigated the coverage case, they did some basic work on Fibreboard's corporate resources, and we negotiated a structured settlement program in 1988 that had a 40 percent cash component in it for the pre-'59 cases that were covered by the Continental and Pacific policies if we won the cases. But we didn't have to pay any cash on the post-'59 cases, where our resources were thinnest. That was one component.

The other component was that in each structured settlement program deal that Fibreboard [173] signed, it made a promise to the claimant that it would not make any impermissible distributions, that's a term of — defined term in the agreement. That means it would not make dividend distributions of any kind above a certain limit, it would not do a leveraged buyout, it would not do any of those corporate reorganization type things that the plaintiffs were afraid that a company like Fibreboard would do in order to escape liabilities in the litigation. That was the structured settlement program that we negotiated with Harry Wartnick and Steve Kazan, and that was half of the program.

The other half of the program was we had to figure out how to pay the 40 percent, because 40 percent was — we didn't have that much money. Fibreboard had just over a hundred million dollars, and that was not going to be enough to finance this program. So we went to Continental and to Pacific and talked about a possible coverage settlement. It was clear we couldn't do a complete settlement, and it was clear with Pacific that they were not interested in an interim agreement. And so we entered

into an interim agreement with Continental Casualty in December of 1988.

* * *

[184] Q. . . . Did you attempt, in about this period of time, to work out a settlement with CNA and Pacific?

A. If about this time is late 1990, I believe we did.

Q. All right. And, briefly, what did you propose and what was the result?

A. It came out of negotiations to get the caps lifted on the defense costs and their agreement, [185] those being unsuccessful, Fibreboard proposed to Pacific Indemnity and Continental that we negotiate a complete policy buyout. That was discussed and Fibreboard made a proposal in late 1990 to accept a certain amount for complete release of all the coverage obligations under the policies.

THE COURT: Was the coverage case — what was its status at that point?

A. In January 1990, Your Honor, Judge Brown issued his judgment, and I think the —

THE COURT: Okay. This was post-judgment?

A. This was post-judgment.

THE COURT: But shortly after?

A. Very shortly after.

MR. MILLER:

Q. You were unable to reach an agreement with the two carriers?

A. That's right. We made a demand and it was rejected. I think Pacific was interested in doing a complete policy buyout, but Continental was not at that time. The demand was $750 million, I believe.

* * *

[231] * * *

Q. Turning your attention to early 1993, Mr. Snyder, what did you consider to be your bargaining position with respect to Continental at that point?

[232] A. Going back to the three things that we had on our minds in 1990, when we started the assignment program, in early '93 we had a new Pacific Indemnity deal which called for a 5.2 order but which could give us as much as $360 million, which I hoped would be enough for Mr. Inselbuch, if I got back to the bargaining table with him, for post-'59 cases. We needed a 5.2 order to ring the bell at that high number. And so we were in litigation against Continental in Texas in the Ness Motley deal in order to get that order.

The assignment program had been a very substantial success, and so we had over a billion two in settlements that we had done. But just as important, it looked as though we would be able to do as many of those settlements as we wanted in the future. And so that is something that we were aware of and I'm sure Continental was aware of. And those two things gave us great leverage and great credibility with Continental. We had enough money to pay for the post-'59 cases in a global negotiation, and we had a settlement vehicle that was very unfriendly to Continental that could keep us out of trouble in

the litigation and alive long enough to get to the coverage case result.

* * *

[303] * * *

Q. When you were negotiating with the Ness Motley [304] firm at that time, how big of a factor were they for Fibreboard? What percentage of the cases across the country did they control or were they involved in?

A. To one extent or another, it appeared they were involved in about 50 percent of all cases brought against Fibreboard across the country.

* * *

[309] * * *

Q. All right. So armed, as it were, with what you thought was an imminent assignment based on the global with the plaintiffs, you turned to the April 9 agreement. And I would like for you to tell us from your perspective what it is basically that Fibreboard got in that agreement and basically what it was that Continental gave.

A. We reached a compromise —

MR. MILLER: Wait a minute.

[Laughter]

MR. MILLER: I'm sorry. You had to give something up to get it, Mr. Snyder.

Q. Would you tell us what that was?

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A. We had several meetings with Judge Higginbotham. We had several meetings in Dallas [310] where Judge Higginbotham was — his office is, Fifth Circuit, and I believe it was at the law firm Vinson & Elkins there. Those meetings went late into the evening, they were fractious, they were contentious, sometimes they were downright nasty. What was most difficult in my perception for Continental was making the commitment to get the global and have it include all the cases, particularly the language, the best-efforts language, which was I believe viewed by them, I know it was viewed by me as a standard that could be judged in the courts and by which they could be held.

* * *

[316] * * *

Q. Did you then make some effort to put together a bilateral, so-called, insurance settlement following that meeting?

A. A couple of things were going on at that time. We had available to us Judge Higginbotham's offices. We were still working with him in connection with the Ness Motley deal. He was still listening to us about global matters. And so on one front, I think we prevailed upon him to try to assist the parties in — in putting something back on the global front. And I think there was a certain amount of depression and despair on the Fibreboard/Continental side. So we did discuss the possibility of perhaps Continental buying out the Fibreboard policy and then Fibreboard would do what it could either to do its own global or simply go off on its own.

Q. And what happened to those discussions?

A. We had meetings in New York, we had a meeting in San Francisco. They were very unproductive meetings. In fact, you know, it was — it would have been better had the meetings never occurred for the ability of Fibreboard and Continental to work

together. And it was very clear that we weren't [317] going to be able to do that sort of deal.

* * *

[335] * * *

Q. How long did it take you to negotiate the terms of what became known as the trilateral settlement?

A. That took most of the day the next day, or most of the morning the next day. Fibreboard obviously wanted the global. The global was a triggering event under the April 9th agreement for Fibreboard to get all its cases covered. The demand of Fibreboard, however, from Continental was that it would pay no more for the trilateral than it was paying for the global.

Q. Period?

[336] A. Period. Fibreboard's point was that if — if the — if the trilateral was all it had, it would incur substantially higher defense costs in the tort system and that money would nowhere be equivalent to what it would be in the global.

We got nowhere with that. And we therefore basically ate the defense component in order to get the global done. And we accepted that term. And that's the term that was laid on the record the next day, that the trilateral that ultimately was worked out would have the same price as the global, and that's what we agreed to.

* * *

[379] * * *

A. The — major issue, the major difference between those two situations has to do with the amount of dispute and transactional

costs that will be in the system. In the trust situation, because of the way that the trust is designed, we're all hopeful that the expenses of administration and defense will be kept within the 10 to 15 percent range that we've relied on experts to advise us on. There is some evidence in other similar circumstances to suggest that that is a — is a reasonable estimate. And we're hopeful that we can stay within that range. We already know what happens in the tort system. In the tort system, we — well, also under the trust, obviously, the plaintiffs' counsel fees are limited to 25 percent. So we're talking about appreciable [380] extra value delivered to claimants in that system.

In the tort system, we know, and one of the purposes of my going through the Fibreboard defense costs yesterday is that it is not unusual to see the defense costs equal and be at the same level as the indemnity payments. In the years 1988, '89 and '90, when Fibreboard was defending claims to set values and was keeping the value in the 5,000 to $4500 range, where I think it belongs, Fibreboard was spending more money on defense than it was spending on indemnity.

* * *

[453] * * *

Q. Okay. If after the complaint was filed, you're [454] not able to come to terms with plaintiffs' counsel and Continental and Pacific on all of the specifics of the global settlement agreement, was there a provision — would there have been an understanding among the parties as to what would have happened in Ahearn?

A. I think my understanding — I can't speak for everybody, Mr. Baron, but my understanding was that if Fibreboard didn't nail down this global, that it was either going to get prosecuted in Linscomb or it was going to get prosecuted in some class action someplace.

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* * *

[464] * * *

Q. Okay. Mr. Snyder, do you have an explanation for me as to why so many people filed claims against Fibreboard prior to the injunction in this case?

[Laughter]

A. I believe — well, I — you know, I'm astounded by that question.

[Laughter]

A. I believe that that is a testament to — to the [465] operation of the contingency fee system in this litigation.

MR. BARON:

Q. Well, are you saying that what was happening here is that lawyers realized that there might be a different deal that might not be as good for their clients and they wanted their clients to get in under the wire?

A. I'm saying it didn't have anything to do with their clients; it had to do with their own financial self-interest, that's what I'm saying.

Q. And what evidence do you have of that?

A. 15 years experience in this litigation and knowing the difference between people who care about their clients and people who don't.

* * *

Appendix B

[517] * * *

Q. [By Mr. Baron] And that's what you interpreted his suggestion to broaden?

A. Yes.

Q. I see. Did you ever attempt to do that, by the way?

A. I talked to a lot of people all through this period during my settlement negotiations about whether we had enough people and the right people. I talked to you, too, about it. And I felt comfortable that we had the right group of people. For the most part, the lawyers in the east and in the Gulf States rely on Steve Kazan and Harry Wartnick about Fibreboard matters. And everybody, including you, told me I couldn't do a deal without Ness Motley.

* * *

[593] * * *

A. Fibreboard, on August the 27th, in order to get a global, went along with Continental's demands. Otherwise, no way would we have entered into that settlement.

Q. Were you forced into it?

A. I don't want to use the term "forced," but it was an awful big carrot.

Q. $2 billion is a pretty good size carrot.

A. No, that's not the carrot, Mr. Baron.

Q. What's the carrot, Mr. Snyder?

A. It was the global settlement agreement that we could not

have, plaintiffs said, unless we also entered into a bilateral with Continental, and Continental said we could not have unless we priced it on the identical terms as the global, which was not in a bilateral negotiating settlement acceptable to [594] us.

Q. So the thing that forced you into the bilateral or trilateral, as it's called, was the plaintiffs working out this arrangement for global?

A. Was the existence of the agreement in principle that was put on the record on the 27th, whereby we had a reasonable prospect of doing a global if the parties, Continental and Fibreboard, would agree on a trilateral. And that agreement was important enough to Fibreboard to make it give on some important points in the trilateral.

* * *

TESTIMONY OF HARRY WARTNICK

[Commencing at page 643]

* * *

You also have heard testimony from Mr. Snyder, have you not, on the subject of Fibreboard's litigation with its carriers?

A. Yes, I have.

Q. Did you follow that litigation?

A. Yes, I did.

Q. And were you aware of the status of that litigation as we approached the year 1991?

A. I've been generally aware of it since the mid-1980s. I actually

attempted to intervene a plaintiff into that litigation back in 1983-1984, sometime in that general time period, and I have followed it generally ever since.

Q. How did you follow it, sir?

A. I was in San Francisco, I paid attention to what was going on at the courthouse. When the various tentative decisions came down from Judge Brown, I obtained copies of it. We obtained copies of the judgment. And when the case went up on [644] appeal, we obtained copies of the various briefs and generally made an effort to keep abreast of what was occurring.

* * *

TESTIMONY OF STEVEN KAZAN

[Commencing at page 903]

* * *

Q. And if I were to ask you the same question about the time course of the Fibreboard insurance litigation, did you follow that as well?

A. I also followed it. I'm not sure I followed it quite as well as Mr. Wartnick did. But, yes, I was aware of it, read the opinions, read the briefs, kept current on what was going on, talked to people at Brobeck about it and so on.

* * *

[911] * * *

Q. Do you have a view that you can offer to the court about whether or not you think the Ahearn settlement is fair?

A. Certainly I do have a view.

Q. Please tell the court.

A. I think it's a very fair settlement, certainly for the members of the Ahearn class.

Q. Why is that, sir?

A. Because in the context that we were dealing with from the start in 1991 and up through the time that the agreement was reached in 1993, just focusing on that period, there was very grave risk involved for members of this class. Fibreboard was a small company that was very important in certain areas of the country and, as Mr. Snyder explained, through the ACF, became increasingly prominent in other areas of the country. It was a company that was effectively swamped by its asbestos exposure. The best illustration of that is this is a company that had around 4 million shares of common stock and at a relevant period it was trading at two, three, four [912] dollars a share. The market was valuing this company at 10 or 15 million dollars when it had assets, as we've heard here, that place it in the 200, 250 million-dollar range, net of asbestos exposure. It had run through most of its insurance coverage, it had left its insurance claims in the California courts and if it lost is coverage, it was all over. If it won its coverage, in my view, it was still all over, but it would have been a slower and more painful death. The risk involved with the insurance coverage litigation was, in my view, very substantial. I don't know that I could have articulated it with quite the elegance of Justice Kaufman, you know, but he was one of the guys at the time who was on the court, and we knew that there was a good result in the trial court, we were optimistic about the intermediate appellate court, although clearly there was substantial risk there, and frankly although we tried not to show it we were scared to death about the California Supreme Court. So there was a very great risk, as we saw it — as I saw it. . . .

Appendix B

* * *

TESTIMONY OF MEYER G. KOPLOW

[Commencing at page 1325]

* * *

Q. Now, would you — at the time when our firm was called in on this in February, when you started to become involved, just to — we've heard Mr. Snyder's testimony as to what he was trying to do, and I'm going to essentially ask you whether the reciprocal was — what the situation was facing Continental. Is it correct that you had had this massive assignment program where tens of thousands of cases had been reported to be settled by Fibreboard essentially using Continental's money and without Continental's consent?

A. Yes, there was such a massive assignment program.

Q. And is it correct that based on what we were advised by those who had been long involved in the situation that the values on these settlements had been very much escalating?

A. Yes, that's correct.

* * *

[1326] * * *

Q. Is it correct that the judicial decisions which had been rendered were not going particularly well for Continental, that Continental had lost its punitive damage case in the Ninth Circuit, Continental had lost the Andres assignment case on the right to assign in the trial court in California?

A. That's also correct.

Q. Now, we did understand that that was not a res judicata procedure, is that correct, in the California procedure?

A. That's right.

Q. And was it also the case that Continental had attempted to take a writ of mandate and get an immediate review of that Andres decision from the California court of appeal and had failed in that attempt?

A. I believe that's what I was advised at the time.

[1327] Q. And as has been testified by all the witnesses, Continental was then faced with the lawsuit brought against it by Fibreboard in this court, by Fibreboard with the plaintiffs allied with Fibreboard who were representing to the court in substance that they had been successful in achieving a settlement of tens of thousands of asbestos cases and that all that was needed to finalize that settlement was for the court to agree with the Andres court that such assignments were indeed valid, that the amounts were reasonable and that it was appropriate to put — to issue a bar order of contribution against Pacific? Is that correct?

A. I believe it to be correct. It was about 20,000 cases at the time.

Q. With the provision for more being added?

A. Well, more were added over time.

Q. And this, as you understood, was a court which had considerable familiarity with asbestos cases and in Cimino had seen values far higher than the values that were in the Ness Motley 1 agreement; is that correct?

A. That was my understanding.

Appendix B

* * *

[1328] * * *

Q. Now, did we then learn or did Continental then learn — I'm not limiting my question to the law firm — was Continental then apprised that [1329] Fibreboard was proposing to enter into a multi-billion-dollar global by way of assignment of all of its cases, class action, presents, futures with the plaintiffs?

A. Yes.

Q. And assuming that the assignments were valid, assuming there was a loss of the coverage case, then were that to happen Continental would have been forced to write checks for billions of dollars under an agreement as to which it had had no say on the terms and was facing the prospect of not being able to get even contribution from Pacific in that situation; is that correct?

* * *

[1376] * * *

Q. And was there then exploration and discussion between Continental and Fibreboard as to the possible [1377] negotiation of a bilateral agreement?

A. Yes, there was.

Q. Would you recount it?

A. We held several meetings with the Fibreboard representatives during the month of June 1993 that were for the purpose of seeing whether we could reach a bilateral agreement that did not include the plaintiffs. There were meetings in New York, there were some limited discussions in Washington, and you may recall that on June 30th, you and I attended a meeting at

the Brobeck offices in San Francisco with a number of members of the Brobeck firm and with Michael Douglas, the general counsel of Fibreboard, in an effort to see whether we could reach agreement on a bilateral.

Q. What were the outcome of those discussions?

A. If I might, I'd like to — I'd just like to interject something to pick up a thread that was left hanging from something I said earlier.

Q. Sure.

A. Part of the — part of the thought in starting to discuss a bilateral was the hope that we could get the plaintiffs interested in something back to the table on a global. When that was reported to the plaintiffs, their attitude was basically, "That's [1378] fine with us; go ahead and reach a deal with Fibreboard. That would be perfectly okay."

We had a very difficult meeting on June 30th. There had been a lot of difficult meetings in this matter, but this one would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. It became very clear to us during the course of that meeting that it was going to be nigh onto impossible to reach a bilateral deal with Fibreboard. We had the Pacific Indemnity problem; that is, that we weren't prepared to lay out billions of dollars without an acceptable level of contribution from Pacific. The Fibreboard appreciation of a bilateral was that if they could not turn around and use the money to achieve a — a settlement, a global settlement with the plaintiffs, they would be left with the obligation of providing their own defense from — from these funds, and they told us that that was going to be a very significant cost. And I got the very definite impression that the Fibreboard side was not in agreement as among themselves as to whether or not a bilateral agreement was something that

was in the best interests of Fibreboard, and came away with the conclusion not [1379] only that it would be a long time before we could put some of the people who had been in the room back in a room together again given — given what had taken place that day, but also that there were people on the Fibreboard side who simply would — would never agree to — to the kinds of numbers that Continental might consider paying on a bilateral.

Q. . . . Do you have a view as to whether there was ever a prospect of successfully negotiating an independent bilateral or trilateral agreement with Fibreboard at a price — well, at the price which is in the trilateral agreement?

A. I don't believe that we could have — that we could have achieved that. We had extraordinary difficulty getting to a trilateral agreement, first in concept after the price parameters we thought had already been set, and then we had tremendous difficulty in getting from an agreement that had been [1380] achieved in principle in New Orleans on September 9th to a documented agreement which didn't get completed until more than a month after that. So I — my own personal view is that but for the plaintiffs having imposed this condition upon us as something that we would be required to achieve before they would ever agree to document a global and work out the rest of the terms and conditions beyond the price term that would be necessary was that there was no chance of achieving a separate bilateral or trilateral agreement with — with Fibreboard.

* * *

[1398] A. What was going on in the first 10 days of July was, as I mentioned, we had gotten close on Ness Motley, close on the price, close on the cash component, and although there were still other terms of the agreement to be worked out, those were the places we had to start. Judge Higginbotham was putting pressure on to try to get to some agreement between Continental and Pacific. And as I said, we had — we had had a horrible

meeting on June 30th about a bilateral. We were due to meet with Judge Higginbotham and the Fibreboard folks and Ness Motley I believe around July 13th. And just before that meeting, we received a letter from Fibreboard that appeared to us to be setting Continental up for a bad-faith claim in the event that global negotiations were unsuccessful.

Q. This is the July 9, 1993 letter?

A. That's the July 9, 1993 letter.

* * *

[1504] * * *

A. . . . At the same time — at the same time, there were other problems that presented themselves that we hadn't anticipated on August 26th when we struck this deal. One of the problems that the court [1505] and counsel would be familiar with is the fact that some 4,000 Baron & Budd claims got filed on August 27th with the claim that they were present claims, not futures. . . .

No. 96-1394

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IN THE

Supreme Court of the United States

October Term, 1996

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CLASS REPRESENTATIVES GERALD AHEARN, *ET AL.*

JOSEPH F. RICE
NESS MOTLEY, LOADHOLT RICHARDSON & POOLE
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

STEVEN KAZAN
KAZAN, McCLAIN, EDISES & SIMON
171 Twelfth Street, Third Floor
Oakland, CA 94607
(510) 465-7728

HARRY F. WARTNICK
WARTNICK, CHABER, HAROWITZ, SMITH & TIGERMAN
101 California Street, Suite 2200
San Francisco, CA 94111
(415) 986-5566

ELIHU INSELBUCH*
CAPLIN & DRYSDALE, CHARTERED
399 Park Avenue, 36th Floor
New York, NY 10022
(212) 319-7125

* *Counsel of Record*

PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5065

JOSEPH B. COX, JR.
COX AND COX, L.L.P.
4300 Six Forks Road, Suite 720
Raleigh, NC 27609
(919) 510-4090

Attorneys for Respondent Class Representatives Gerald Ahearn, et al.

PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately described in the petition except that James Drake and Juanita Drake are not plaintiff class representatives (and, indeed, as far as respondents are aware, were not parties below) and William Mitchell is an additional class representative and a respondent herein.

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INTRODUCTORY STATEMENT

The respondent class representatives adopt and incorporate the statement of the case and the reasons for denying the writ set out in the separate briefs in opposition filed by respondents Continental Casualty Co., Columbia Casualty Co., CNA Casualty Co. of California (collectively, "Continental") and Pacific Indemnity Co. ("Pacific") and by respondent Fibreboard Corporation ("Fibreboard"). We suggest that the Court read those briefs first. This brief addresses those matters that bear particularly on class members' interests in, conduct of and representation in this case.[1]

In seeking review, petitioners present a picture of the settlement at issue that ignores its striking benefit to the class in resolving an otherwise all or nothing insurance coverage dispute, seriously overstates the extent to which the settlement affects class members' ability to control the resolution of their individual personal injury claims, and completely omits any reference to the almost universal acceptance of the settlement by class members and the numerous members of the plaintiffs' bar who handle such claims on a regular basis.

Indeed, most of the legal arguments mounted by petitioners against the settlement are dependent on the false premise that the personal injury claims asserted in the complaint completely define the issues being resolved by the settlement. What petitioners would have the Court ignore is that the primary

1. This brief is being filed on behalf of respondents Gerald J. Ahearn, James R. Dennis, Charles W. Jeep, William J. Mitchell and James Ellison (collectively the "class representatives") in opposition to the petition for certiorari filed on behalf of Esteban Ortiz, *et al.* (cited as "Pet."). Respondents have previously joined in a brief in opposition to the earlier petition for certiorari filed by James Flanagan and David H. Middleton (No. 96-1379) in this case. Citations to the Appendix ("App. __") are to the appendix to the Ortiz petition.

controversy being resolved by the settlement is in fact an insurance coverage dispute between Fibreboard and its insurers in the resolution of which the class members had legal and economic interests in securing a source of recovery for their personal injury claims against Fibreboard which, were Fibreboard to lose the dispute, would otherwise go unpaid.

Regrettably, the petition, like the dissent below, is replete with numerous misstatements of the record concerning the negotiating history and structure of the settlement that, if not corrected, would suggest that the representative plaintiffs and their counsel labored under numerous disabling conflicts of interest and were otherwise inadequate representatives of the class.

REASONS FOR DENYING THE PETITION

A. There Has Been No Miscarriage Of Justice.

Although petitioners make no serious argument that the settlement here is financially unfair to the class, in a variety of ways petitioners insinuate (and the dissent below on which petitioners heavily rely flatly asserts) that the class representatives and their counsel have inadequately represented and otherwise sold out the class in agreeing to this settlement.[2] At various places in the petition, class counsel are alleged to have been "hand-picked" by Fibreboard (Pet. 10) to engage in "a friendly joint venture" with Fibreboard (Pet. Question Presented (3)) to "extinguish" the class members' claims against it (Pet. 7) for a derisory $10 million payment (Pet. 6) in exchange for $43.7 million in attorneys fees (Pet. 8), while simultaneously negotiating generous settlements on behalf of individual clients who were not in the class out of insurance funds that could otherwise have gone to the class (Pet. 8-9).

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2. *See, e.g.*, Pet. 10; App. 65a-69a.

The inferences that petitioners would have this Court draw from their misleading and selective presentation of the record are that, to use Judge Smith's words, a "miscarriage of justice" (App. 70a) has occurred which this Court should rectify. Nothing could be further from the truth.[3]

Asbestos-related personal injury cases have been brought in increasing numbers against Fibreboard and others since at least 1967 (App. 218a-219a). By the mid-1980's, both the factual and legal bases for Fibreboard's liability to persons injured by exposure to its asbestos-containing products was well-established (App. 219a). By 1987, asbestos-related cases were being filed against Fibreboard at the rate of 13,000 to 17,000 cases a year (App. 231a).

Since 1979, Fibreboard has also been engaged in litigation with Continental and Pacific over two insurance policies alleged to provide it with $500,000 per claim coverage — with no aggregate limits on the number of claims covered — for all asbestos-related personal injury claims brought against it by persons exposed at any time prior to March 15, 1959, to any asbestos-containing product manufactured, distributed or sold by Fibreboard (App. 232a-234a). Although that litigation (the "Coverage Case"), which was consolidated with similar cases between other asbestos manufacturers and their insurers, had resulted in favorable trial court rulings in favor of Fibreboard

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3. The record in this case is extensive, although one would not know it from reading either the petition or Judge Smith's dissenting opinion. And contrary to Judge Smith's justification (App. 107a) for his substitution of his views of the competence and integrity of class counsel for those of the district court which heard all the evidence presented at an eight-day evidentiary hearing (which was preceded by massive discovery taken by petitioners), there were factual disputes in this case and the district court's resolution of them is subject to review for clear error, not appellate *de novo* review. Rule 52(a), Fed. R. Civ. P.; *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985).

by 1990 (App. 232a-235a), Continental and Pacific had taken appeals (App. 236a).

By late 1988, as a result of the exhaustion of all but $100 million of available insurance (except for the disputed Continental and Pacific policies), Fibreboard had inadequate cash to defend and pay its ever-mounting asbestos liabilities (App. 243a). Using its remaining funds, Fibreboard undertook, successfully, to negotiate a structured settlement program ("SSP") with members of the plaintiffs' bar, principally Steven Kazan and Harry Wartnick (who had for many years been Fibreboard's principal West Coast adversaries). The SSP program paid a portion of each settlement in cash but payment of most of the settlement amount was made contingent on the outcome of the Coverage Case (App. 243a-245a, 356a).

However, by early 1991 even the SSP program was no longer possible and Fibreboard began negotiating "assignment settlements" under which it paid no cash but, to the extent of the settlement amount, assigned its rights under its disputed Continental policy to the plaintiff (App. 251a-252a). Continental objected to this procedure and extensive litigation among it, Fibreboard and plaintiffs ensued (App. 252a-257a).[4]

It was in this context that the initial discussions that ultimately led to the settlement at issue here began. In late 1990 or early 1991, representatives of Fibreboard contacted a partner in the Ness Motley law firm (which by that time was involved in virtually all major trials against Fibreboard) and Messrs. Kazan and Wartnick about the possibility of negotiating a global assignment settlement of Fibreboard's present and future

4. During this period, Fibreboard and Pacific reached a conditional $360 million settlement of their dispute of which $225 million was contingent upon their obtaining a judgment cutting off any contribution rights Continental might have against Pacific (App. 248a-251a).

personal injury asbestos-liabilities (App. 259a-260a). During 1991, Joseph Rice of Ness Motley, Steven Kazan and Harry Wartnick, and two partners of Caplin & Drysdale whom they retained to assist in the negotiations (collectively "plaintiffs' counsel"),[5] proceeded to obtain and evaluate extensive information, including expert epidemiological and investment banking advice, about Fibreboard, its assets and its existing and future asbestos liabilities, as well as about developments in the Coverage Case (App. 260a-264a).

Based on that information, protracted negotiations took place during 1991 looking towards a Rule 23(b)(3) opt-out class action global assignment settlement covering both present and future claims. These negotiations were terminated in December 1991 because of the parties' inability to agree on mutually acceptable terms and attempts to revive them in 1992 failed (App. 266a-267a). At no time was Continental a party to those negotiations, although it was kept informed of them (App. 267a) as were members of the asbestos plaintiffs bar (App. 265a).

Following the failure of the global assignment settlement negotiations, the Ness Motley firm and Fibreboard negotiated an assignment settlement agreement covering roughly 20,000 existing clients of that firm and its affiliates which was executed in December of 1992 (App. 268a-269a). Upon the conclusion of that agreement, by January of 1993, Fibreboard had settlement agreements in place involving debt to present asbestos claimants exceeding $1.2 billion (*id.*), more than five times its total value excluding asbestos liabilities (App. 343a).

In early 1993, Fibreboard sued Continental in the Eastern District of Texas, seeking a declaration that the Ness Motley assignment settlement agreement it had just made was binding

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5. Another Ness Motley partner, Joseph B. Cox, Jr., became involved in the negotiations in May 1992 as one of plaintiffs' counsel.

on Continental in the event Fibreboard prevailed in the Coverage Case and an order barring Continental from asserting any contribution rights against Pacific (App. 269a-270a). The case was assigned to then District Judge (now Circuit Judge) Robert M. Parker. As that litigation proceeded, settlement negotiations took place that resulted in the signing of an agreement on April 9, 1993 (the "April 9 Agreement") between Continental and Fibreboard pursuant to which, *inter alia*, the parties mutually agreed to seek a global settlement of all Fibreboard's present and future asbestos-related personal injury liabilities, to be funded entirely by insurance, in return for which Fibreboard would cease making assignment settlements (App. 274a-276a). Following the April 9 Agreement, Continental promptly filed suit in the Eastern District of Texas against Fibreboard and Pacific seeking, in effect, to invalidate Fibreboard's prior settlement with Pacific. This case was also assigned to Judge Parker and was consolidated with the litigation between Continental and Fibreboard over the Ness Motley agreement (App. 276a-277a).

At the end of April 1993, plaintiffs' counsel met with counsel for Continental and Fibreboard to discuss a possible global settlement. Continental's offer of $2 billion (payable over 25 years without interest)[6] to resolve all of Fibreboard's unliquidated present claims and all future asbestos claims was summarily rejected by plaintiffs' counsel (App. 277a-278a). Thereafter, negotiations took place among Ness Motley, Continental and Fibreboard concerning the group assignment settlement then being litigated before Judge Parker (App. 278a-279a). At the same time unsuccessful negotiations took place between Fibreboard and Continental concerning a possible settlement of their insurance coverage dispute (App. 279a-280a).

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6. Depending on the discount rate used, as plaintiffs' counsel could easily recognize, the present value of this offer was at least $1 billion less than its face amount.

Between approximately May 1, 1993, and August 9, 1993, no meaningful negotiation for a global class settlement occurred. Instead, representatives of Fibreboard, Continental and Ness Motley devoted their efforts, at the recommendation of Circuit Judge Patrick E. Higginbotham who was serving as a mediator, to resolving the litigation over the Ness Motley assignment settlement, which they finally accomplished in early August 1993 through execution of a revised Ness Motley agreement covering 45,000 then pending cases (App. 278a-285a).

Following Judge Parker's approval of the settlement of the Fibreboard/Continental litigation involving the Ness Motley assignment settlement in August 9, 1993, the parties, joined for the first time by Pacific in mid-August, negotiated towards a possible global settlement covering both the remaining unsettled present claims and all future claims against Fibreboard (App. 285a-292a). During this period, a significant impetus toward reaching an agreement was created by the parties' knowledge that a decision by the California Court of Appeal on the Coverage Case appeal by the insurers was imminent (App. 294a, 296a). After plaintiffs' counsel concluded that a settlement including present claims was impractical, an agreement in principle on a $1.535 billion cash, futures-only, global settlement was reached on August 27, 1993, and announced in open court (App. 292a-298a).

One significant term of the August 27, 1993 agreement in principle was a provision plaintiffs' counsel insisted upon, requiring a "back-up" settlement between Fibreboard and the two insurers of the Coverage Case that would become operative only if for any reason the global settlement were not approved (App. 295a-296a). Negotiation of that $2 billion back-up agreement,[7] known as the Trilateral Agreement, took over six

7. As the record makes clear, the $2 billion represents nothing more than the sum of the $1.525 billion which the insurers had agreed to pay the (Cont'd)

weeks (App. 298a-301a), and an additional ten weeks was required to reach the actual global settlement agreement (App. 301a-302a).

Meanwhile, on September 9, 1993, plaintiffs filed the complaint in this action against Fibreboard (App. 300a) and Continental and Pacific filed motions to intervene the same day (App. 543a-546a). The parties jointly moved for provisional certification of the plaintiff class in the action (which was granted) (App. 515a-518a, 547a-551a) and Fibreboard and the insurers sought and received a temporary restraining order against the filing of additional claims by members of the provisionally certified class against them (App. 300a). Thereafter, the court extended the temporary restraining order and, following a hearing, entered a preliminary injunction (App. 300 n. 22).

Following execution of the global settlement agreement, a massive dissemination of the notice of the proposed settlement took place in the latter part of 1994 (App. 419a-430a). Objections to the proposed settlement on behalf of class members have been pressed only by the five petitioners herein and the two petitioners in No. 96-1379 (App. 202a, 404a, 430a).

After completion of the dissemination of notice, the district court permitted petitioners to intervene and allowed them to conduct extensive discovery (App. 18a). The district court then held an eight-day hearing at which petitioners were afforded an

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(Cont'd)

futures class in the global settlement and $475 million which was the insurers' estimate of their obligation to resolve those existing cases not yet settled either under the revised Ness Motley agreement or by other Fibreboard/insurer settlements reached with plaintiffs during the summer of 1993 (App. 295a-296a, 298a-299a, 320a-321a).

unrestricted opportunity to question the representatives and expert witnesses of the settling parties (including plaintiffs' counsel) concerning all matters relevant to the fairness of the proposed settlement (*id.*). No petitioner has raised any claim that he was afforded either insufficient discovery or inadequate participation in the settlement approval proceedings. Following the hearing, the district court approved the proposed settlement, entering extensive findings of fact (App. 209a-435a), conclusions of law (App. 436a-479a), and a memorandum opinion (App. 149a-208a).

As the district court found, given the very real risk that Fibreboard would lose the Coverage Case[8] — with the attendant result that Fibreboard's $235 million net worth would be dwarfed by the over $1.2 billion of unfunded settlements with non-class members for which it was already liable — a settlement under which that significant risk was eliminated for the class by providing $1.535 billion in cash payable to a trust for the benefit of the class is clearly and overwhelmingly a great benefit to the class. While there can be no assurance that $1.535 billion will be sufficient to pay the claims of all class members in full, the evidence of record shows that that amount, subject to the distribution procedures of a trust established for the benefit of all the class members, is more likely than not adequate to compensate the claims of all class members at fair and appropriate values and the district court so found (App. 322a-327a).[9]

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8. Uncontroverted expert testimony at the settlement approval hearing, credited by the district court, demonstrated the correctness of the negotiating parties' views that the risk was substantial (App. 237a-242a, 323a-324a). No contrary evidence was proffered by petitioners or anyone else.

9. No contrary evidence was proffered by petitioners or anyone else at the settlement approval hearing.

Notwithstanding petitioners' innuendoes (Pet. 10) and Judge Smith's intemperate assertions that the class members "suffer dramatically" (App. 78a) and are "the only losers" (App. 66a) from the settlement, they point to nothing in the record of this case that would furnish any basis for the Court to conclude that the district court and the Fifth Circuit panel majority erred in finding that the $1.535 billion settlement of this coverage dispute was eminently fair, reasonable and adequate from the perspective of the class (App. 63a-64a, 207a). Instead, petitioners (and the dissent below) would carve the settlement into pieces and contend that it is unfair for Fibreboard to settle its liability to the class for only $10 million of its own funds (Pet. 6; App. 65a, 84a-85a). This contention, however, is based upon the wholly erroneous premise articulated by Judge Smith that the settlement "is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth" (App. 84a).

Such a view can only be based on the false proposition that, absent a settlement with the class, Fibreboard and the insurers would (and indeed did) settle their insurance disputes among themselves (Pet. 3 n.1, 4). It ignores the fact, as demonstrated by the record, that despite repeated efforts to do so, Fibreboard and the insurers could not settle the Coverage Case independently (App. 246a-257a, 267a-268a, 279a-280a). If Fibreboard prevailed in the Coverage Case it would have virtually unlimited insurance and would not be faced with insolvency. It would not settle for an amount which left its solvency threatened and Continental would not pay an amount which, in effect, conceded the Coverage Case. The *only reason* Fibreboard agreed to the Trilateral Agreement (which did leave it exposed to the risk that continued litigation with individual class members would eventually exhaust the $1.525 billion

included to cover those claims and ultimately bankrupt Fibreboard) was that plaintiffs' counsel made such a back-up agreement a condition precedent to their entering into the global settlement agreement (App. 295a-296a, 298a-299a) which, if approved, would preserve Fibreboard's equity.

Moreover, under the April 9 Agreement Continental had agreed with Fibreboard that any global settlement with plaintiffs would be entirely funded out of insurance proceeds (App. 275a-276a). Thus, as a practical matter, plaintiffs could not compel Fibreboard to agree to any class settlement that would come out of its own coffers because Fibreboard could simply turn to Continental for the funds. Of course, from plaintiffs' perspective, as long as they received a fair amount in settlement they were indifferent as to who paid it.

Finally, the notion that class members traded away Fibreboard's liability "for nothing to which they did not already have a right" (Pet. 10; App. 65a), to the extent the point is comprehensible at all, appears to assume that the class members already had the right to Fibreboard's insurance from Continental and Pacific in some specific amount — but, of course, the Coverage Case was all about whether such insurance was zero or some greater, and possibly open-ended, amount. And it was the Coverage Case dispute, to which the class members were, as a practical matter, indispensable parties, that was resolved initially by the agreement in principle to a global settlement.[10]

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10. The indispensability of the class members to resolution of the Coverage Case is demonstrated by the companion *Rudd* case — a fact assiduously overlooked by petitioners and Judge Smith. A condition to the Trilateral settlement was the bringing of a declaratory relief action against the very class that is the plaintiff class in this case for a determination that they are bound by that settlement. Although that action (the *Rudd* case) was brought against a non-opt-out futures class, and the class representatives consented to the entry of the judgment sought therein, neither petitioners nor

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If the point is that the Trilateral settlement gave the class a "right" to the insurance proceeds, it is equally wrong. The record below conclusively demonstrates that the class will receive hundreds of millions of dollars less out of the Trilateral settlement (even including Fibreboard's entire net worth in the calculation) because (i) in an effort to drive case values down far enough to save its net worth, Fibreboard will be forced to spend hundreds of millions of dollars in defense costs litigating individual class member claims and (ii) class members will also pay tens of millions of dollars of additional attorneys fees to their counsel for handling their claims against Fibreboard in the tort system in excess of the 25 percent cap on fees for representation before the settlement trust imposed by the global settlement agreement (App. 327a-331a).

Indeed, it is this dramatic difference in the net dollars that will ultimately be received by class members, in the event this global settlement is rejected by the courts and they are left to litigate with Fibreboard in the tort system, that makes petitioners' and Judge Smith's assertions that the class is being victimized by this settlement ring so hollow. It is one thing for petitioners to seek to convince this Court that application of their views of legal rules governing class action settlements should preclude this settlement from being finally approved. However, petitioners' corollary proposition — which they ask this Court to grant certiorari to endorse — that it would be an affirmative benefit to the class as a whole to allow Mr. Ortiz and his co-petitioners to win the race to judgment, and thereby contribute to the exhaustion of the insurance proceeds available to pay the later-maturing claims of other class members, is preposterous.

(Cont'd)

Judge Smith raised any of the jurisdictional or Rule 23 objections to *Rudd* they assert against this settlement. Indeed, petitioners filed an amicus brief in support of affirmance of *Rudd* in the Fifth Circuit and Judge Smith joined that portion of the panel majority's opinion affirming *Rudd* (App. 75a).

B. No Serious Question Is Raised About Adequacy Of Representation.

Both as part of their innuendoes about the unfairness of this settlement to the class and their explicit assertions of inadequate representation of the class under Rule 23(a)(4) of the Federal Rules of Civil Procedure, petitioners cast a variety of unfounded aspersions upon the conduct of plaintiff's counsel in negotiating this settlement. All are belied by the record and, even if they were open to dispute, are factual questions inappropriate for review by this Court.

To set the stage, petitioners (supported by Judge Smith) initially seek to impugn plaintiffs' counsel's independence by asserting that they were "hand-picked" by Fibreboard to negotiate this settlement (Pet. 10; App. 68a, 70a). The inference they seek the Court to draw is, of course, that Fibreboard sought out members of the plaintiffs' bar who were either beholden to it or otherwise believed to be likely to be less than vigorous negotiators on behalf of the class.

As shown by the record, although it is true that Fibreboard initiated class settlement discussions in 1991 with Messrs. Kazan, Wartnick, Rice and Motley (later replaced by Mr. Cox), their selection simply was a recognition of the fact that those lawyers were Fibreboard's principal adversaries in the tort system at that time and, in the case of Messrs Kazan and Wartnick, had been so for years (App. 259a-260a, 355a-356a). Indeed, the Ness Motley firm was involved at that time in roughly 50% of all asbestos claims in the United States and in virtually all major trials involving Fibreboard, while Messrs. Kazan and Wartnick were generally considered by the asbestos plaintiffs' bar to be the lawyers most knowledgeable about Fibreboard (*id.*). Thus, both Fibreboard and Continental chose to negotiate a

global settlement with plaintiffs' counsel because they realized that those lawyers would be accepted by the plaintiffs' asbestos bar as the most aggressive and knowledgeable representatives of claimants' interests (App. 356a).[11]

Next, petitioners (and Judge Smith) contend that plaintiffs' counsel labored under a disabling conflict of interest because (i) they represented a competing group of non-class plaintiffs at the same time they negotiated this settlement for the class and (ii) they settled those individual claims for higher-than-average amounts, contingent upon a global settlement (Pet. 8, 14; App. 76a-77a, 107a-109a). These contentions are both factually and legally wrong.

First, since asbestos personal injury claimants are not adversaries, the only possible conflict among them would arise if they were competing for limited resources. Petitioners seek to suggest such a conflict here (Pet. 14), but, given the open-ended nature of the disputed insurance coverage, the district court correctly concluded that there was in fact no such competition between the so-called "present" claimants and the "futures" class (App. 363a, 367a) and the panel majority agreed (App. 34a). Moreover, despite some insinuation to the contrary by Judge Smith (App. 68a, 76a), there is no evidence whatsoever in the record to support the proposition that plaintiffs' counsel "sold out" the interests of the class in return for better settlements

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11. Inconsistently with their complaint that Fibreboard hand-picked plaintiffs' counsel, petitioners also complain that Judge Parker purported to "authorize" and "appoint" plaintiffs' counsel in early August of 1993 to negotiate this settlement (Pet. 4). Given that such counsel had already been negotiating global issues with Fibreboard off and on for over two years and that any such appointment or authorization by Judge Parker gave them no legal capacity they did not already possess, respondents are at a loss to know what impropriety petitioners are claiming before this Court.

for the present individual clients and the district court expressly found to the contrary (App. 374a-375a).[12]

Second, the suggestion that the term in the revised Ness Motley agreement providing that the second 50 percent of the payments due thereunder would be conditioned on, *inter alia*, a global settlement of all Fibreboard's asbestos personal injury liabilities created "huge financial interests" (Pet. 14) for plaintiffs' counsel to negotiate a settlement for the class "on *any terms*" (App. 108a) is also incorrect. To begin with, Messrs. Kazan and Wartnick were not involved in the Ness Motley settlement and Caplin & Drysdale did not and do not represent any individual asbestos personal injury plaintiffs at all. Moreover, the district court expressly found, based on expert testimony, that on the facts here, the so-called back-end-payment contingency did not create an impermissible conflict of interest even for the Ness Motley firm (App. 372a-373a). The panel majority reached the same conclusion (App. 33a-34a). There is no reason for this Court to review the extensive district court

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12. Indeed the district court found that the revised Ness Motley settlement was actually used by plaintiffs' counsel to leverage *up* the claim values used in arriving at the global settlement (App. 374a) and the panel majority concurred (App. 32a). Judge Smith, by contrast, relies entirely on his personal views (based on law review articles written by others) of the Ness Motley firm's conduct in negotiating the *Georgine* settlement (at issue in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, No. 96-270 (argued February 18, 1997)) in suggesting that similar conduct occurred here (App. 76a, 110a). Not only is the *Georgine* settlement wholly unrelated to this one, but the allegations concerning the Ness Motley firm's conduct are controverted by the district court findings in that case and were hotly disputed (but never decided) on appeal. Moreover, none of the other plaintiffs' counsel in this case were even involved in the *Georgine* settlement much less alleged to have engaged in any similar conduct there and Mr. Kazan is one of the principal antagonists of Ness Motley in *Georgine* (including representing the Cargile respondents in *Amchem*).

fact findings on which it and the court of appeals based their respective determinations that no disabling conflict of interest for plaintiffs' counsel was present in this case.

C. No Serious Question Is Raised About Class Member Conflicts.

Petitioners also claim, as they allege in *Amchem*, that the class was "plagued by an inherent, structural intra-class conflict between presently injured and exposure-only class members" (Pet. 14). Once again this position, articulated more fully by the dissent below (App. 110a-114a), is long on rhetoric and short on (indeed controverted by) facts of record.

First, as Judge Smith acknowledges, this asserted conflict arose out of the trust distribution provisions of the global settlement which governed how the settlement funds would be paid over time to class members and did not exist with respect to the negotiations over the total settlement amount (App. 114a). Thus, at most, the issue presented is whether there should have been separately represented subclasses during the subsequent negotiation of the trust distribution procedures and not whether the settlement as a whole is flawed.

Second, the supposed conflict here, according to Judge Smith, is that the class members with "extant claims" would oppose any limits on their recoveries from the settlement trust (being indifferent to its ultimate depletion), while those with "latent claims" would seek "damage caps" to ensure that the trust would not run out of funds by the time their claims became extant (App. 111a).

While superficially plausible, this argument entirely ignores the basic premise on which this non-opt-out class settlement is based — absent a unitary settlement of the Coverage Case the

entire class runs the risk of going uncompensated for both their extant and latent injuries. Any unitary settlement for less than a guaranteed 100 percent payment of all recoverable present and future damages of class members — and all settlements are by their nature compromises from full recoveries — requires equitable apportionment of the settlement fund among the class members. Judge Smith's point thus proves too much because, if accepted, every Rule 23(b)(1)(B) action would require the creation of subclasses (and attendant separate counsel, at least following the initial agreement on the settlement amount) for each category of class member who could arguably claim entitlement to some form of different treatment from any other category of class member.

Moreover, Judge Smith wholly fails to explain how a court would identify the multiplicity of conflicting interests requiring subclassing, how a court would select counsel for those subclasses in the middle of ongoing settlement negotiations and how any disputes among the subclass representatives would be resolved short of litigation in the event of a negotiating impasse among them.

In this case, although no subclasses were created, four of the class representatives had extant claims for either malignant diseases (plaintiff Jeep had mesothelioma and plaintiff Ellison had lung cancer) or non-malignant diseases (plaintiffs Ahearn and Dennis had asbestosis), while only one plaintiff, Mitchell, alleged exposure to asbestos-containing products manufactured by Fibreboard but had not manifested any asbestos-related disease (App. 348a-349a, 351a). The class representatives with extant claims were aware that the restrictions imposed by the various spendthrift provisions of the settlement trust — no punitive damages, a $500,000 cap on compensatory damages, possible delays in payment with priority given to claimants with cancer — would limit their and other class members' recoveries

in order to ensure that all class members were treated fairly and they agreed with that result (App. 350a-351a). Similarly, plaintiffs' counsel historically represented large numbers of asbestos personal injury plaintiffs and they likewise concurred that the spendthrift provisions of the trust, including notably the 25 percent cap on attorneys fees on amounts recovered from the trust, were fair to all class members (App. 386a).

Strikingly, notwithstanding all the rhetoric about conflicting interests, the only conflicts that petitioners and Judge Smith point to between the "extant" and "latent" claimants are those provisions of the trust distribution process that are designed to prevent extant claimants from depleting the settlement trust's assets to the detriment of the latent claimants. This is, however, exactly the type of "conflict" at which application of Rule 23(b)(1)(B) to provide for equitable allocation of limited resources is aimed.

Based on the facts, on competing expert testimony and on the extent to which the two proposed subclasses' interests in this unitary settlement coincide rather than diverge, the district court concluded that separate subclass representation was neither legally nor ethically required (App. 386a-389a) and the panel majority concurred (App. 35a-37a). Notwithstanding Judge Smith's contrary views (which are largely unsupported by the record[13]), these factbound issues do not warrant review by this Court.[14]

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13. Indeed most of Judge Smith's dissent on this point, as elsewhere, is based on his view of the facts in *Amchem* and not on the record of this case (App. 112a-113a).

14. Although prudently not expressly raised by petitioners, Judge Smith also asserts a conflict between "pre-1959" and "post-1959" class members (App. 114a-116a). In a particularly telling rebuttal to his assertion that the

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D. The Claims Settled Here Were Real And Could Have Been Litigated By The Class.

Many of the legal arguments advanced by petitioners are based on their contention that this settlement is based on a " 'case' brought by plaintiffs who do not in good faith plead claims they intend to litigate, and which is brought as a friendly joint venture with the defendants" (Pet. Question Presented (3)).

Thus, petitioners claim that the Fifth Circuit majority erred in holding that the Rule 23(a) requirements of commonality and typicality were met by "ignor[ing] class members' actual legal claims and instead wholly rely[ing] on the settlement" (Pet. 11). The claims referred to are, according to petitioners, "individual, *in personam* personal injury claims *against Fibreboard*" contained in a complaint which "was no more than a contrivance to ripen prematurely claims that will exist, if at all, only at some unknown time in the future" — "a charade" (Pet. 16).

Based on the foregoing characterization of the case, petitioners argue, in addition, that (i) because the claims in the complaint could not be certified as a class action without the defendant's consent, plaintiffs had no leverage against the defendant in the settlement negotiations (Pet. 12), (ii) the claims of the class representatives are not typical because "the class is

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conflict issues he raises involve "[n]o factual dispute[s]" and thus appellate review should be *de novo* (App. 107a), Judge Smith's analysis of this alleged conflict is flatly erroneous in, among other things, asserting that "[t]he global settlement . . . eliminated the privileged status of pre-1959 claimants" (App. 115a) when, as the record demonstrates, that distinction (based on available insurance coverage) was eliminated by both the April 9 Agreement and the Trilateral Agreement, both of which *preceded* the negotiations of the trust distribution provisions of the global settlement agreement (App. 37a, 383a-384a).

'a hodgepodge of factually as well as legally different plaintiffs' " (Pet. 14), and (iii) class members cannot make meaningful decisions about whether to object to the settlement because their asbestos-related injury claims are unaccrued and thus unknown (Pet. 15).

Implicitly recognizing that the settlement here did resolve the class's claims against Fibreboard's insurers, petitioners assert that (i) those claims involved only a dispute between Fibreboard and the insurers (in which the class is aligned with Fibreboard) and (ii) the class could not have litigated any such claims against the insurers (Pet. 16-17). The very history of this dispute and its resolution demonstrates how wrong the petitioners are.

When the plaintiffs filed their complaint in 1993, the law of the Fifth Circuit, embodied in decisions such as *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981), appeared to require the district court to review the class settlement achieved here primarily on the basis of the fairness of the settlement itself to the absent class members, and the complaint simply served as a vehicle to bring the settlement before the Court for review and approval as required by Rule 23(e) of the Federal Rules of Civil Procedure. Almost two years after plaintiffs filed their complaint, and following completion of the settlement approval hearings, the Third Circuit decided *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), which was followed shortly by its decision in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, No. 96-270 (argued February 18, 1997). Petitioners read those cases to stand for the proposition that a class cannot be certified under Rule 23 if it asserts claims that cannot be litigated to judgment in the absence of a settlement. Anticipating a favorable decision by this Court in *Amchem*, the petitioners argue that the class here was improperly certified

because the complaint that commenced this action similarly asserted no claim that could have been litigated in the absence of a settlement.

This approach stands the issues discussed in *General Motors* and *Amchem* on their heads. The question is not whether the parties have settled the issues they pleaded but, rather, whether they could have litigated the issues they settled.

Had *General Motors* been decided before the plaintiffs filed their complaint, and were it then the law in the Fifth Circuit, the plaintiff class would have filed a different complaint to invoke the District Court's jurisdiction to consider this settlement and, if necessary, to litigate the very claims that the class in fact settled here.

Had they been required by this Court's as yet unrendered decision in *Amchem* to do so, the plaintiffs could have pleaded claims — for declarations that Fibreboard was entitled to its disputed insurance proceeds, and if necessary, that the Trilateral settlement was not binding upon the plaintiffs — capable of being litigated to judgment in the absence of this settlement, and that were in fact settled by this settlement. Although the class complaint did not specify these claims for relief, the issues that underlie these claims were in fact the focus of the proceedings below, and they were fully litigated by petitioners and the other parties at the fairness hearings.

The plaintiffs here had a strong and unitary interest in the outcome of the coverage dispute; that interest was pleaded in their complaint, *see* Complaint ¶¶ 11-24 (App. 532a-535a); and they had standing to litigate that interest under California law,[15]

15. California law, which would govern under Texas conflicts of law rules, *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414, 421 (Tex. 1984), (Cont'd)

as well as under the Declaratory Judgment Act, 28 U.S.C. § 2201.[16] And, indeed, they could properly litigate that interest in a Rule 23(b)(1)(B) class action since the piecemeal prosecution of separate actions by individual class members over the coverage issues would as a practical matter be dispositive of the interests of the remaining class members — the very predicate of a Rule 23(b)(1)(B) action. Moreover, as a suit seeking declaratory relief, such an action could also have proceeded as a mandatory, non-opt-out class action under Rule 23(b)(2).[17]

Of course, such a declaratory judgment action could have been settled among the plaintiffs, Fibreboard and Continental as was done in this settlement.

Had Fibreboard settled the coverage dispute with Continental without the plaintiffs' participation or consent, in a manner unsatisfactory to the plaintiffs, the plaintiffs could have brought suit for a declaration that the settlement was not binding

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permits third-party plaintiffs to obtain declaratory relief against a defendant's insurer before judgment on a coverage question to determine the existence and scope of coverage. *See Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965). *See also Horace Mann, Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993).

16. *See Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978).

17. That rule provides for mandatory class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

on them, and that the settling parties were not entitled to a judgment that would bind the plaintiffs to a settlement that would impair their rights against those parties, where the settlement did not provide sufficient proceeds or adequate provisions to ensure all of them a full recovery. Indeed, such a declaratory judgment action would lie to anticipate the suit that would inevitably be brought (and, indeed, was brought in *Rudd*) against the class by Fibreboard's insurers to obtain the Settlement Agreement Approval Judgment required by the Trilateral settlement (App. 60a-63a). *See Superior Oil Corp. v. Pioneer Corp.*, 706 F.2d 603, 607 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

And, again, such a case could be litigated as a Rule 23(b)(1)(B) class action. As the district court found at the fairness hearing, the Trilateral settlement would have liquidated the disputed insurance coverage for an amount that, even combined with Fibreboard's equity, would not have sufficed to ensure that all class members, left to assert their claims individually in the tort system, would receive a full recovery from Fibreboard (App. 324a-325a). Thus, the risk remained that piecemeal litigation would exhaust the Trilateral settlement proceeds and Fibreboard's other assets, and would as a practical matter be dispositive of the interests of the remaining, uncompensated class members. That risk would justify the litigation of the claim under Rule 23(b)(1)(B). And, again, as a suit seeking declaratory relief, it could also have proceeded as a mandatory class action under Rule 23(b)(2) and could have been settled.

Thus, if this Court were to decide *Amchem* as petitioners hope, in determining whether to grant review in this case (or vacate and remand to the Fifth Circuit) plaintiffs suggest that the only issue before the Court would be whether or not to deem the pleadings amended to conform to the evidence adduced at the fairness hearings, pursuant to Rule 15(b) of the Federal Rules

of Civil Procedure,[18] hardly meriting review. Moreover, as this Court has before it a complete record on which to render its decision, there is no reason to remand the case to the court of appeals or the district court simply to conform the complaint's allegations to the claims actually litigated in the fairness hearings.[19]

Finally, as for petitioners' contention that "meaningful notice" could not be given to the class (Pet. 15), the class members who received notice of the proposed settlement simply had to decide whether their interests would be better served by this settlement or by either rolling the dice on the Coverage

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18. Appellate courts permit pleading amendments on appeal where necessary to affirm a trial court judgment. *See* 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d § 1494 (1990). Indeed, courts of appeal have deemed pleadings "constructively amended" to conform them to the proof and decision below without requiring a formal motion to amend from the plaintiff. *See, e.g., Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388-89 (5th Cir. 1984); *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 201-02 (5th Cir. 1965).

19. *See* 28 U.S.C. §§ 2106, 2111; *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984).

Petitioners' reliance (Pet. 17) on *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), is misplaced. Unlike here, where the matters actually litigated in the fairness hearings encompassed the insurance coverage issues described in both the complaint and the notice to the class, the settlement in *Super Spuds* purported to settle and release certain claims not held by the class representatives, not alleged in the complaint and nowhere adverted to in the class notice. *See* 660 F.2d at 17-19 and n. 7. And to the extent petitioners read the decision more broadly to hold that a class action settlement cannot release claims that were not specifically presented to the trial court for adjudication, such a reading is inconsistent with this Court's decision in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996).

Case or taking hundreds of millions of dollars less in the Trilateral settlement. That choice is straightforward and, contrary to petitioners' arguments, wholly unaffected by the fact that the asbestos-related personal injury claims of most class members are as yet unaccrued.[20]

CONCLUSION

Motivated by their expressed desire that petitioner Ortiz be entitled to obtain and collect a judgment "*in its entirety*" without interference by any other class members (Pet. 23), petitioners have tied up this $1.535 billion settlement on appeal for over two years asserting a combination of factual misrepresentations about the record and inapposite legal arguments ostensibly made on behalf of those class members — the "exposure-only" claimants — whose very interests petitioners seek to impair for their own benefit. The thousands of members of the class whose asbestos-related personal injuries caused by exposure to Fibreboard products have become manifest over the last four years should not be required to wait further to obtain compensation for their injuries. This Court should deny the petition.

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20. Since normally no class member can predict whether he or she would even be affected by the settlement's spendthrift limitations and since the potential impact of those limitations on any given class member is dwarfed by the magnitude of the choice between securing $1.535 billion versus either nothing at all or several hundred million dollars less in the aggregate, any class member can certainly "meaningfully assess *today* whether the settlement will be in his best interests at such future time as an asbestos-related injury may occur" (Pet. 15). Moreover, if the class had to wait until all injuries had manifested, the Coverage Case would have decided the issue. Clearly, the class was not required by the rules of procedure to roll the substantive dice.

Respectfully submitted,

JOSEPH F. RICE
NESS MOTLEY, LOADHOLT
RICHARDSON & POOLE
151 Meeting Street,
Suite 600
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

STEVEN KAZAN
KAZAN, McCLAIN,
EDISES & SIMON
171 Twelfth Street,
Third Floor
Oakland, CA 94607
(510) 465-7728

HARRY F. WARTNICK
WARTNICK, CHABER,
HAROWITZ, SMITH
& TIGERMAN
101 California Street,
Suite 2200
San Francisco, CA 94111
(415) 986-5566

ELIHU INSELBUCH*
CAPLIN & DRYSDALE,
CHARTERED
399 Park Avenue, 36th Floor
New York, NY 10022
(212) 319-7125

* *Counsel of Record*

PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE,
CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5065

JOSEPH B. COX, JR.
COX AND COX, L.L.P.
4300 Six Forks Road,
Suite 720
Raleigh, NC 27609
(919) 510-4090

Attorneys for Respondent Class Representatives
Gerald Ahearn, et al.

(8)

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ESTEBAN ORTIZ, *et al.*,
Petitioners

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

April 14, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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REPLY BRIEF FOR THE PETITIONERS

1. Hiding behind the fairness of the now-finalized insurance coverage settlement between Fibreboard and its insurers, Respondents offer little rebuttal on the constitutional, statutory, and Rule 23 issues presented by the quite distinct settlement in *this* case. Unlike the Trilateral Agreement that resolved only the disputed insurance coverage, the Global Settlement at issue here extinguishes class members' rights to pursue future, individual, personal injury damages lawsuits against Fibreboard. The question before the Court, as Justice Kennedy remarked at the oral argument in *Amchem Products, Inc. v. Windsor*, No. 96-270 (Feb. 19, 1997), is not whether it would be "far superior" to replace traditional litigation with new forms of dispute resolution, but whether there is a "substantive source of law" that gives the federal courts authority to do so. Tr. Oral Arg. 10. In their ninety pages of opposition briefs, the respondents fail to identify any such font of substantive law.

To divert attention from their inability to answer that fundamental question, the respondents assert that we have distorted this case in order to "leverage" our petition on two cases considered by the Court this Term: *Amchem v. Windsor* and *Adams v. Robertson*, No. 95-1873 (writ dismissed as improvidently granted, March 3, 1997). Br. in Opp. of Continental Cas. Co., *et al.* ("Insurers Opp.") 1. Although respondents now pretend not to see the overlapping issues, they have long been obvious to parties and courts alike.

- The Fifth Circuit majority below noted the conflict with the Third Circuit's decision in *Georgine v. Amchem Products*, but expressly declined to follow that decision (App. 21a-22a), for which the panel was condemned by Judge Smith in dissent. App. 74a.
- The district court below predicated its Rule 23(a) analysis on the district court decision that was reversed by the Third Circuit in *Amchem*. App. 191a.
- As the Court will recall, the settling parties in *Amchem* obtained a writ of certiorari by stressing the "square conflict" on Rule 23 between the Third Circuit there and the Fifth Circuit here. Cert. Pet. in No. 96-270 at 9-11, 16 n. 12. Indeed, one of the class counsel in this case, who is also class counsel in *Amchem*, repeatedly invoked the decision below in his *Amchem* brief as guidance for how the plaintiff class urged the Court to rule in *Amchem*. Br. of Class Counsel Joe Rice *et al.*, in No. 96-270 at 14, 21.

- Class counsel here *concede* that "if this Court were to decide *Amchem* as petitioners hope," the plaintiff class in this case would have to abandon this lawsuit and try to "file[] a different complaint to invoke the District Court's jurisdiction," plead different claims, and seek different declaratory relief. Br. in Opp. of Class Counsel ("Class Counsel Opp.") 21-24.
- The commonality of issues between this case and *Adams v. Robertson* is confirmed by the fact that *all* of the respondents here were so concerned about a possible adverse merits decision by the Court in *Adams* that they filed an amicus brief in support of the Robertson respondents. Respondents expressly stated that their "interest" in the *Adams* case was that "it, like *In re Asbestos Litigation* [this case], involves a challenge to a mandatory class settlement by objectors asserting a constitutional opt-out right." Br. Amici Curiae of Continental Cas. *et al.* in No. 95-1873 at 2.

2. Respondents try to obfuscate the similarities between this case and both *Amchem* and *Adams*. According to respondents, this case presents "a uniquely compelling reason why a unitary class settlement was necessary" (Insurers Opp. 2) because the Global Settlement was supposedly essential to resolve a dispute between Fibreboard and its insurers — a dispute in which class members have an interest as third party beneficiaries under California law. Fibreboard Opp. 17. That claim does not withstand scrutiny.

The Trilateral Agreement of October 12, 1993 disproves respondents' scare-tactic suggestion that the Global Settlement is necessary to protect class members "from losing [their] only chance at recovery." Insurers Opp. 30. It is undisputed that the Trilateral Agreement, by its own terms, is *independent of the Global Settlement*. App. 17a-18a. It provides that, if the Global Settlement fails, the insurers will pay Fibreboard $2 billion, which Fibreboard can then use — in addition to its own assets — to pay future (unfiled) and present unresolved asbestos-related claims. *Id.* Furthermore, the Trilateral Agreement provides another $1.5 billion to pay Fibreboard's *past*, unpaid settlement obligations. Fibreboard's counsel testified that the Trilateral Agreement was worth $3.35 billion. Tr. 604.[1]

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[1] To be sure, the *Continental Cas. Co. v. Rudd* proceeding, App. 58a-63a,

Unlike the Global Settlement, the Trilateral Agreement does not limit asbestos victims' tort remedies, nor does it bind them to an alternative dispute resolution (ADR) process for the adjudication of their state-law personal injury claims. The very existence of the Trilateral Agreement reveals that the Global Settlement has two analytical components: the first resolves the insurance dispute (just as the Trilateral Agreement did), and the second trades class members' potential lawsuits against Fibreboard for ADR claims against a Trust whose liabilities are limited to insurance proceeds plus $10 million of Fibreboard's $250 million net worth. App. 84a. Our attack focuses on the second of these components.

Tellingly, respondents' sole basis for touting the Global Settlement as superior to the Trilateral Agreement is the very same inadmissible value of "increased efficiency over individual litigations in the tort system" (Insurers Opp. 1) that, they protest, taints only *Amchem* and *Adams*, and not their arguments in this case. Thus, respondents criticize the Trilateral Agreement for "leav[ing] class members' claims to be resolved in litigation against Fibreboard" and for failing to impose the euphemistically described "equitable distribution and asset-conservation procedures established by the Global Settlement." *Id.* at 9. Any risk that class members' future lawsuits against Fibreboard might exhaust the $2 billion provided under the Trilateral Agreement has nothing at all to do with the insurance coverage dispute, and everything to do with the inherent costs of litigation, due process, the right to jury trial, and the limits of Art. III. As Justice Ginsburg remarked (Tr. Oral Arg. 9) during the *Amchem* argument:

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which approved the Trilateral Agreement, granted the insurers declaratory and injunctive relief establishing that the Trilateral Agreement was fair with respect to the class members even though it cut off their right to sue the insurers directly. But this relief did not affect the rights of asbestos victims *to sue Fibreboard*. Yet the Global Settlement extinguishes future, not-yet-justiciable tort claims against Fibreboard — claims for injuries that do not exist but might arise in the future. By contrast, the class members in *Rudd* had a common interest in resolving the propriety of an *existing* settlement between Fibreboard and its insurers. That certainly does *not* give class members a common interest in "unitary resolution" of their potential personal injury claims against Fibreboard. *See also* Appendix to Fibreboard Opp. 7a, 10a-16a.

> [I]t was my understanding that there is a right for one to litigate one's own claim, and that's the basic rule, and if that's going to be displaced, there has to be a good reason for it, and that good reason, I assume, is not for the courts to make up in the guise of procedure.

3. Respondents claim that, as a factual matter, there would not have been any resolution of the insurance coverage dispute absent the Global Settlement. That claim is both irrelevant and inaccurate. The peculiarities of the bargaining process, as recounted by respondents' self-serving testimony, cannot give a federal court authority under Rule 23, the Rules Enabling Act, the Rules of Decision Act, due process, or Art. III to alter the substantive rights of class members or to exercise jurisdiction in a feigned case.

Further, respondents' assertion is belied by the very terms of the Trilateral Agreement, which provide that it will be in force precisely if and when the Global Agreement has been invalidated and when Fibreboard thus is not insulated from asbestos claims in the tort system. App. 17a-18a. Despite respondents' intimations to the contrary, the district court *never* found that the coverage dispute would not have settled but for the Global Agreement. Instead, the court found (Finding of Fact 140, App. 279a-80a) that Continental and Fibreboard were unable to reach a bilateral settlement of the coverage case in 1993 *only* because (i) CNA's offer was not high enough, and (ii) CNA wanted Pacific to contribute. The Global Settlement was not necessary to overcome either stumbling block.

Respondents can cite only conclusory and ambiguous rhetoric (App. 198a) in the district court's memorandum opinion (*not* its Findings of Fact), which cannot be equated with a finding that the insurance coverage dispute could not have been settled without asbestos victims giving up their claims against Fibreboard. Indeed, at the fairness hearing Fibreboard's counsel *denied* that such extinguishing of claims was necessary. Appendix hereto 1a. He testified that, just a month prior to reaching the Global Settlement, Fibreboard had been willing to accept a coverage settlement that would have paid it *$150 million less* than it ultimately received in the Trilateral Agreement (whose total value was about $3.35 billion). *Id.*

4. Respondents also insist that this case is different from *Amchem* and *Adams* because the Global Settlement does "*not*

liquidate the recoveries of individual class members." Insurers Opp. 2. Yet the Global Settlement fixes the ADR procedure through which the claims will be liquidated, just as the *Amchem* settlement does. Cert. Pet. 7; App. 559a-597a. That procedure is *not* the procedure established under applicable state law. The mere fact that the Global Settlement contains less detail than the *Amchem* settlement and does not establish a comprehensive compensation schedule does not affect the legal issues. App. 74a. Indeed, once respondents' mischaracterizations of this case are corrected, it is plain that this case presents the same constitutional, statutory, and Rule 23 issues as *Amchem* and *Adams*, plus an important question regarding Rule 23(b)(1)(B).

5. It is beyond dispute that the court below openly and avowedly sustained certification of the class under Rule 23(a) entirely by reference to the settlement. App. 22a, 23a, 24a n.8. The "vice" is the same one identified by Justice Souter in *Amchem*: the "settlement is being used as a sufficient basis in and of itself to answer ... these various preceding conditions for class certification." Tr. Oral Arg. 17. *See also id.* at 13, 14, 16, 18 (questions of Souter, J., and Ginsburg, J.). Indeed, the vice is, if anything, more iniquitous and menacing in this case, because the legal issues that allegedly furnish the requisite commonality and typicality under Rule 23(a) for this class certification are created *not* by the claims alleged in this class action, *but by another lawsuit.*

Respondents themselves are unanimous that the "common" issue arose not from the asbestos personal injury claims in the class complaint here (App. 536a-39a), whose certification under Rule 23 was at stake, but instead involved the "avoidance of a loss on the coverage appeal" being litigated between Fibreboard and its insurers in a different lawsuit. Fibreboard Opp. 22; Class Counsel Opp. 21; Insurers Opp. 16. Indeed, class counsel concede the complete disconnect between the personal injury claims pleaded in the class action complaint and the "common interest" in Fibreboard's insurance coverage litigation that supposedly makes the asbestos claimant class cohesive and certifiable under Rule 23. Class Counsel Opp. 21-22.

A commonly held interest as contingent third-party beneficiaries in the settlement of an insurance coverage dispute being litigated in

a California state court cannot possibly fulfill the Rule 23(a) prerequisites for certification of a separate personal injury class action pending in a federal court in Texas. If the settlement of a different lawsuit to which the plaintiff class is not party is indeed sufficient to meet the requirements of Rule 23, then that rule would appear to have no limits left at all.

6. The petition demonstrated that the questions posed in *Adams v. Robertson*, No. 95-1873 (Mar. 3, 1997) (*per curiam*), are also presented here. This Court has displayed "continuing interest" (slip op. *id.* at 8 n.6) in the question whether due process requires opt-out rights for the kinds of *in personam* money damages claims that were the *only* legal claims pled in the class complaint here. App. 536a-540a. The petition also demonstrated that the "limited fund" contrived by respondents cannot justify certification under Rule 23(b)(1)(B), particularly as informed by the Rules Enabling Act, the Rules of Decision Act, and principles of federalism.[2]

Respondents' answer to both arguments hinges on their attempt — which flies in the face of the complaint — to repackage this case as a wholly equitable proceeding to secure the insurance proceeds for class members. That attempt fails because such a repackaging, even if permitted, *would not allow resolution of class members' individual personal injury claims against Fibreboard. See* pages 2-4, *supra*. Moreover, the cases cited by respondents relate to conflicting claims over a *pre-existing res* that antedated the litigation — such as a bond, a trust fund, a ship, or a fixed sum — not to claims regarding a fund that is itself *created* by a settlement. Fibreboard *concedes* that this was not a "situation with fixed, known assets to be parceled out." Fibreboard Opp. 21. As Justice Souter observed in the *Amchem* argument, there will *always* be a "limited fund" in the settlement context in the sense that there is an upper limit to what the defendant is willing to pay. Tr. Oral Arg. 14. If that were sufficient to trigger Rule 23(b)(1)(B) — as respondents imply with their simplistic argument that Rule 23(b)(1)(B) applies

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[2] Even the Supreme Court of Alabama, which approved the *Adams* class, has rejected application of Rule 23(b)(1)(B) to tort actions based on speculation regarding exhaustion of the defendant's assets. *Ex parte Holland*, 1997 WL 139479, *6-9 (Ala. Mar. 28, 1997).

whenever there is a theoretical "risk" that satisfaction of one class member's claim will compete with another's (Insurers Opp. 11-12) — then *every* settlement of claims for money damages would be eligible for treatment not only under Rule 23(b)(3) but also under Rule 23(b)(1)(B).

The underlying substantive rights of *in rem* claimants are *already* limited by any competing claims against the same *res*. Therefore, a mandatory class action encompassing all competing claims does nothing to alter the substantive rights of class members.[3] By contrast, outside of bankruptcy, the substantive law does not allow courts to limit individual plaintiffs' *in personam* recoveries in order to ensure that money will be left for later-suing persons.[4]

7. Respondents opine that the Art. III questions raised in the petition here, similar to those at issue in *Amchem*, are "contrived" and of no possible interest to this Court. Insurers Opp. 18 & n.*. Yet in *Amchem* Justice Ginsburg expressed doubts about the

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[3] In *Christopher v. Brusselback*, 302 U.S. 500 (1938), this Court noted that the jurisdiction of federal courts in a class suit is limited "to render[ing] a decree binding upon absent defendants *affecting their interest in property witnin the jurisdiction of the court*." *Id.* at 505 (emphasis added). The cited reference to Justice Story's COMMENTARIES (Insurers Opp. 21) pertains not to traditional *in personam* claims for money damages, but to proceedings where "a few creditors may maintain a suit on behalf of themselves and all other creditors of a deceased debtor" to distribute the estate. COMMENTARIES ON EQUITY PLEADINGS, § 99 (9th ed. 1879). Professor Chafee, upon whom respondents also rely (Insurers Opp. 21, 23), acknowledged that class actions were historically limited to the *in rem* context, where "all the members are connected similarly with land or money within the jurisdiction." *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1308 (1932). "On the other hand, if the enjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence." *Id.*

[4] The personal jurisdiction analysis of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), also applies here, for this is a class action "concerning claims wholly or predominantly for money judgments." *Id.* at 812 n.3. Respondents' attempt to limit *Shutts* to state courts (Insurers Opp. 26-27) is unavailing, as several lower courts have held. *See, e.g., Carlough v. Amchem Products*, 10 F.3d 189, 200 (3d Cir. 1993)("traditional minimum contacts requirement applies" in a federal diversity class action); *Waldron v. Raymark Industries*, 124 F.R.D. 235, 238 (N.D.Ga. 1989)(language in *Shutts* is "equally applicable to federal courts").

propriety of a federal district court "creating this vast exposure-only litigation that never existed," Tr. Oral Arg. 20; Justice Scalia suggested that there is no "case or controversy" when parties show up to ask a court to adjudicate a settlement they've already agreed upon, *id.* at 25-26; and Justice Kennedy indicated that such a cooperative effort to have a federal court enact an alternative dispute resolution scheme would appear to "exceed[] the bounds of case or controversy." *Id.* at 24-25.

Respondents insist that their cooperative class action is justiciable because it depends on approval of a court under Rule 23(e) and on the issuance of an injunction to bind the absent class — but that same analysis in *Amchem* was criticized as apparently "circular" by Justice Souter. Tr. Oral Arg. 26. The respondents, like the settling parties in *Amchem*, rely on *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), and its progeny. Insurers Opp. 19 & n.*; Fibreboard Opp. 26. But as Justice Kennedy pointed out, in those consent-decree cases there was an actual contemplated lawsuit and "an imminent litigable dispute," Tr. Oral Arg. 32, that would have transpired if the consent decree were not issued, whereas here is it *undisputed that the class never had any intention of litigating the class complaint, which was filed solely to provide the district court with a jurisdictional hook.* App. 52a.[5] As Justice Ginsburg pointed out, such theoretical future plaintiffs "do not have a claim for relief because they haven't been injured yet." Tr. Oral Arg. 57-58.[6]

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[5] In the consent decree cases there was every reason to think that, if the defendants had not consented to the decrees banning future misconduct, and if those decrees had not been approved by the courts, the government and the private parties who opposed it would have gone back to litigating against each other as they had been preparing to do. After all, the consent decree cases involved continuing conflict between the parties over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift*, 276 U.S. at 326 (injunction concerned "not with past violations, but with *threatened future ones*") (emphasis added); *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984) (case justiciable because of "prospective injunctive relief" against "future violations of securities laws").

[6] The Chief Justice and Justice Scalia suggested that the consent decree cases might be distinguishable on the further ground that they were all government agency cases that preserved the rights of individuals injured by the defendant's conduct. Tr. Oral Arg. 27. *See, e.g., Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976).

Remarkably, respondents concede that the settled "claims" have nothing to do with what was actually pleaded in the complaint. They say that, if this Court were to insist, they would be happy to "file a different complaint to invoke the District Court's jurisdiction to consider the settlement" — that is, a complaint actually "capable of being litigated to judgment in the absence of this settlement." Class Counsel Opp. 21. Evidently it's all the same to the respondents, since the pleadings and this lawsuit are a charade in any event.

But class counsel suggest that it would be simpler for this Court to cure their failure to allege genuine, justiciable claims by "deem[ing] the pleadings amended to conform to the evidence adduced at the fairness hearings," pursuant to Fed.R.Civ.P. 15(b). *Id.* at 23-24. Such sleight-of-hand won't help respondents. First, Rule 15(b) merely allows deemed amendments of complaints which are themselves sufficient to support federal jurisdiction; a failure of jurisdiction is not some minor pleading discrepancy that can be retroactively papered-over on appeal. Second, the two new claims urged by class counsel to support jurisdiction to approve the Global Settlement — (i) that Fibreboard was in fact insured by the contested policies and (ii) that the settlement between Fibreboard and its insurers was not binding on the class — were *not* in fact litigated at the fairness hearing, so there is nothing to which the defective complaint can be "conformed." Indeed, the very purpose of that proceeding (and of the Global Settlement itself) was to *avoid* a judicial decision on the coverage issues. Third, even if the Court were to pretend that the hypothetical claims involving the class stake *in favor* of insurance coverage for Fibreboard had been alleged and proven, those claims would not allow approval of the Global Settlement, because it extinguishes entirely *different* claims — the class members' individual personal injury claims *against Fibreboard*.

8. The Fifth Circuit majority grudgingly accepted the general proposition that the Bankruptcy Code governs the distribution of the assets of a company beset by more creditors than it can satisfy. App. 42a. But convinced that it could do a better job in this case, *id.* at 42a-43a, and citing 11 U.S.C. § 305(a)(1), the court below concluded that Congress intended that "the terms and principles of the Bankruptcy Code would be circumvented by debtors and creditors who found superior methods of asset distribution." App.

44a. Respondents likewise argue that this section of the Code "expressly authorizes the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be 'better served.'" Insurers Opp. 29.

But § 305(a)(1) (Appendix hereto 2a) merely allows a federal court to dismiss or suspend a bankruptcy proceeding "if an arrangement is being worked out by creditors and the debtor out of court." H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977). It is an *abstention* provision designed to promote voluntary private ordering by economic actors. It is *not* a grant of *authority* to the federal judiciary to ignore Art. III and the Rules Enabling Act, and to circumvent the Bankruptcy Code, by using Rule 23 to legislate its own solutions that prospectively alter the substantive, state-law rights of unknowing, unidentified, unconsenting tort victims.[7]

The decision below thus raises the very problem that appeared to concern this Court in *Amchem*. As Justice Kennedy put it:

> If I were the district judge, I'd say, this is marvelously superior, but that is a substantive determination that you are going to displace existing law with a new, different, substantive regime, and I don't think the rules allow you to do that.

Tr. Oral Arg. 10-11. Making and imposing such substantive choices "is not the intent of [Rule 23]" and "exceeds the authority of the courts under the rule. ... [it] is the basis for legislation." Tr. Oral Arg. 22 (Kennedy, J.). *See also id.* at 23-24, 56-57. The Fifth Circuit's almost cavalier arrogation of legislative authority demands the plenary attention of this Court.

CONCLUSION

The petition should be granted or, at the very least, held for disposition pending the resolution of *Amchem v. Windsor*, No. 96-270.

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[7] Indeed, in the Bankruptcy Reform Act of 1994, Congress enacted special provisions for insolvent defendants subject to present and future asbestos-related liabilities. *See* 11 U.S.C. §§ 524(g) & (h).

Respectfully submitted.

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners Esteban Ortiz, et al.

April 14, 1997

APPENDIX

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

TESTIMONY OF STEPHEN M. SNYDER, Esq., Counsel for Fibreboard Corporation

[Commencing at page 592 of the Joint Appendix in the Fifth Circuit:]

Q: [W]ould you agree with me, then, that it would have been impossible under that agreement for Continental to have settled their coverage in a way that would not have let — would not have extinguished all of the asbestos liabilities of Fibreboard?

A: No, that's not true at all.

Q: What would have been the circumstances where that could have happened?

A: I believe we had negotiations with them in 1993 whereby if they had written a big enough check we would have done just that.

Q: Okay.

A: Just didn't work, that's all.

[Commencing at page 605 of the Joint Appendix in the Fifth Circuit:]

Q: So you would have been willing to enter into a bilateral settlement with Continental in July [1993] for a little over $3 billion, a little over a hundred or two hundred million over $3 billion?

A: 3.2 or something like that.

APPENDIX

11 U.S.C. § 305(a)(1)

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title or may suspend all proceedings in a case under this title at any time if —

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension.

(9)

Supreme Court, U.S.
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APR 23 1997
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No. 96-1394

IN THE

Supreme Court of the United States

October Term, 1996

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT CLASS REPRESENTATIVES GERALD AHEARN, *ET AL.*

JOSEPH F. RICE
NESS MOTLEY, LOADHOLT RICHARDSON & POOLE
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

STEVEN KAZAN
KAZAN, McCLAIN, EDISES & SIMON
171 Twelfth Street, Third Floor
Oakland, CA 94607
(510) 465-7728

HARRY F. WARTNICK
WARTNICK, CHABER, HAROWITZ, SMITH & TIGERMAN
101 California Street, Suite 2200
San Francisco, CA 94111
(415) 986-5566

ELIHU INSELBUCH*
CAPLIN & DRYSDALE, CHARTERED
399 Park Avenue, 36th Floor
New York, NY 10022
(212) 319-7125

* *Counsel of Record*

PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5065

JOSEPH B. COX, JR.
COX AND COX, L.L.P.
4300 Six Forks Road, Suite 720
Raleigh, NC 27609
(919) 510-4090

Attorneys for Respondent Class Representatives Gerald Ahearn, et al.

3 PM

Pursuant to Rule 15.8 of the Supreme Court Rules, respondent class representatives *Gerald Ahearn, et al.* submit this supplemental brief to bring to the Court's attention the applicability of its recent decision in *Chandler v. Miller,* No. 96-126, to an argument made in the reply brief of petitioners *Esteban Ortiz, et al.*

At page 9 of their reply brief the Ortiz petitioners assert that respondents cannot ask the Court to deem their complaint amended to plead the insurance coverage disputes that were settled here because Rule 15(b) does not permit deemed amendments of complaints to cure a failure of jurisdiction. In *Chandler v. Miller,* at note 2, this Court specifically held, in reliance on 28 U.S.C. § 1653, that a representation of counsel at oral argument was sufficient to cure a suggestion of mootness which would otherwise have deprived the Court of jurisdiction to consider the appeal. The same principle is applicable here.

Respectfully submitted,

ELIHU INSELBUCH*
CAPLIN & DRYSDALE, CHARTERED
399 Park Avenue, 36th Floor
New York, NY 10022
(212) 319-7125

* *Counsel of Record*

PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, DC 20005
(202) 862-5065

JOSEPH B. COX, JR.
COX and COX, L.L.P.
4300 Six Forks Road, Suite 720
Raleigh, NC 27609
(919) 510-4090

JOSEPH F. RICE
NESS MOTLEY, LOADHOLT
RICHARDSON & POOLE
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

STEVEN KAZAN
KAZAN, McCLAIN, EDISES
& SIMON
171 Twelfth Street, Third Floor
Oakland, CA 94607
(510) 465-7728

HARRY F. WARTNICK
WARTNICK, CHABER, HAROWITZ,
SMITH & TIGERMAN
101 California Street, Suite 2200
San Francisco, CA 94111
(415) 986-5566

Attorneys for Respondent
Class Representatives Gerald Ahearn, et al.